Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

DAN A. MORGENSTERN, M.D.,

Petitioner,

vs.

CHARLES S. WILSON, M.D., et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether a federal district court's interlocutory order for injunctive relief which by its own terms does not become final until 60 days following the completion of the appellate process, and thereby imposes no present obligations on the parties, allows the losing party to appeal immediately to a circuit court of appeals under 28 U.S.C. § 1292(a)(1), and whether determination of jurisdiction in that circumstance is subject to the "serious, perhaps irreparable, consequence" test established in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981).

II.

Whether an appellate court's reversal of a specific factual finding by a "blue-ribbon" jury that Lincoln, Nebraska and Omaha, Nebraska are in separate geographic markets for purposes of adult cardiac surgery, made pursuant to correct jury instructions and in response to interrogatories submitted to the jury, constitutes a denial of the Seventh Amendment constitutional right to have the jury make factual determinations.

PARTIES TO THE PROCEEDINGS

Parties to the proceedings below, not listed in the caption, consist of the following respondents:

Deepak Gangahar, M.D.

Herbert E. Reese, M.D.

Walt E. Weaver, M.D.

Christopher C. Caudill, M.D.

Joseph R. Gard, M.D.

Sabyasachi Mahapatra, M.D.

Robert J. Buchman, M.D.

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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

I. THE COURT OF APPEALS DID NOT HAVE JURISDICTION UNDER 28 U.S.C. § 1292(a)(1) TO DETERMINE THE APPEAL 7

A. THE DISTRICT COURT DID NOT "GRANT" AN INJUNCTION TO PETITIONER 8

B. THE COURT OF APPEALS FAILED TO APPLY THE *CARSON* TEST TO DETERMINE ITS JURISDICTION TO HEAR THE APPEAL ON AN INTERLOCUTORY BASIS 12

II. THE COURT OF APPEALS IMPROPERLY DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO HAVE THE JURY MAKE FACTUAL DETERMINATIONS 18

CONCLUSION 24

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Baltimore Contractors v. Bodinger, 348 U.S. 176 (1955), *overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) 7, 9, 17

Brown v. Kerr-McGee Chemical Corp., 767 F.2d 1234 (7th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986) .. 13, 14

Carson v. American Brands, Inc., 450 U.S. 79 (1981)...*passim*

Center for National Security Studies v. Central Intelligence Agency, 711 F.2d 409 (D.C. Cir. 1983)..... 13

Cohen v. Board of Trustees, 867 F.2d 1455 (3d Cir. 1989)..... 10

Commodity Futures Trading Commission v. Preferred Capital Investment Co., 664 F.2d 1316 (5th Cir. 1982)..... 9, 10, 17

Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962)..... 21

Donovan v. Robbins, 752 F.2d 1170 (7th Cir. 1985) 14

Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991)..... 20

Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978)..... 13

General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932)..... 13

Gould v. Control Laser Corp., 650 F.2d 617 (5th Cir. 1981)..... 14

Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988)..... 16

TABLE OF AUTHORITIES – Continued

Page

Hershey Foods Corp. v. Hershey Creamery Co., 945 F.2d 1272 (3d Cir. 1991) 9

Lavender v. Kurn, 327 U.S. 645 (1946) 20

Lewis v. Tobacco Workers Intern. Union, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979) 10

Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976) 11

Live and Let Live, Inc. v. Carlsberg Mobile Home Properties, Ltd.-'73, 592 F.2d 846 (5th Cir. 1979) 8

Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1307 (1994) 24

McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d 323 (8th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988) 21

Riverview Investments, Inc. v. Ottawa Community Improvement Corp., 899 F.2d 474 (6th Cir.), *cert. denied*, 498 U.S. 855 (1990) 24

Robinson v. Magovern, 521 F. Supp. 842, *aff'd* 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982) 23

Shirey v. Bensalem Township, 663 F.2d 472 (3d Cir. 1981) 14

South Bend Consumers Club, Inc. v. United Consumers Club, Inc., 742 F.2d 392 (7th Cir. 1984) 14

Stateside Machinery Co. v. Alperin, 526 F.2d 480 (3d Cir. 1975) 9

TABLE OF AUTHORITIES – Continued

Page

Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987) 16

Tokarcik v. Forest Hills School District, 665 F.2d 443 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982) 13

United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) 21

United States v. RMI Co., 661 F.2d 279 (3d Cir. 1981) 14

United States v. Rockford Memorial Corp., 717 F. Supp. 1251 (N.D. Ill. 1989), *aff'd* 898 F.2d 1278 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990) 22

The Vollrath Co. v. Sammi Corp., 9 F.3d 1455 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2163 (1994) 24

Williams Electronics, Inc. v. Artic International, Inc., 685 F.2d 870 (3d Cir. 1982) 15

Winterland Concessions Co. v. Trela, 735 F.2d 257 (7th Cir. 1984) 13

STATUTES

15 U.S.C. § 2 ..... 2, 5

15 U.S.C. § 15 5

15 U.S.C. § 26 5

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292(a)(1) ..... *passim*

28 U.S.C. § 1337 5

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY

Kenneth Elzinga & Thomas Hogarty, *The Problem with Geographic Market Delineation in Antimerger Suits*, 18 The Antitrust Bulletin 45 (1973)..... 22

Lawrence A. Sullivan, *Antitrust* § 19 (1977)..... 22

15B Charles A. Wright, et al., *Federal Practice and Procedure* § 3915.5 (1992)..... 8

16 Charles A. Wright et al., *Federal Practice and Procedure* § 3922 (1977) 10

16 Charles A. Wright, et al., *Federal Practice and Procedure* § 3924 (1977) 10

OPINIONS BELOW

1. *Dan A. Morgenstern v. Charles S. Wilson, et al.* Eighth Circuit Opinion, July 20, 1994. App. 1

2. Memorandum and Order on Motion for Judgment as a Matter of Law, April 26, 1993. *Dan A. Morgenstern v. Charles S. Wilson, et al.* App. 14

3. Memorandum and Order on Defendants' Motion for New Trial, April 26, 1993. *Dan A. Morgenstern v. Charles S. Wilson, et al.* App. 24

4. Order for Injunctive Relief, April 26, 1993. *Dan A. Morgenstern v. Charles S. Wilson, et al.* App. 35

5. *Dan A. Morgenstern v. Charles S. Wilson, et al.* Eighth Circuit Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc, September 9, 1994. App. 38

6. Judgment entered by the District Court on September 29, 1994. *Dan A. Morgenstern v. Charles S. Wilson, et al.*, App. 39

JURISDICTIONAL STATEMENT

The Eighth Circuit Court of Appeals issued its opinion in this case on July 20, 1994. The court on July 28, 1994 granted a two week extension of time to file a Petition for Rehearing and Suggestion for Rehearing en Banc. A Petition for Rehearing and Suggestion for Rehearing en Banc was timely filed on August 17, 1994 and denied on September 9, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1292(a)(1) provides:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> > (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

2. 15 U.S.C. § 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

For several years, the cardiologists and cardiac surgeons who practiced in Lincoln, Nebraska discussed joining together in a group practice. In January, 1987, the eleven cardiologists and cardiac surgeons who practiced in Lincoln, Nebraska signed an Agreement of Intent to form the Nebraska Heart Institute ("NHI") in order "to integrate the medical practices of the Parties and share the business risks of operating a combined medical practice." NHI was formed in April, 1987. In July, 1987, the doctors associated with NHI began practicing together in the same office. At the time of its formation, the shareholders of NHI comprised 100% of the cardiologists and cardiac surgeons who practiced in Lincoln, Nebraska.[1]

In July, 1987, Dr. Dan Morgenstern was hired by CVTS as a cardiac surgeon. Shortly before the end of his first year, he was informed that he would not be made a permanent shareholder with the group because of a personality conflict with one of the shareholders in CVTS. Although he would not become a shareholder, his employment contract was extended for a second year during which time he continued to perform cardiac surgery on patients referred to him by cardiologists associated with NHI.

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[1] Prior to the formation of NHI, the cardiac surgeons practiced together in Cardiovascular & Thoracic Surgery, P.C. ("CVTS"). CVTS continued to exist after the formation of NHI. Prior to the formation of NHI, the cardiologists practiced in two separate groups. Contemporaneous with the formation of NHI and continuing thereafter, the cardiologists joined together to form Cardiology Consultants, P.C. ("CCPC").

During his two-year association with NHI, Dr. Morgenstern performed 180 cardiac surgeries as the lead cardiac surgeon, which constituted approximately 18% of all cardiac surgeries performed by NHI physicians during that time period. All of the cardiologists associated with NHI referred patients to Dr. Morgenstern throughout his tenure with the group, even after they were aware that he would not become a shareholder. The last surgery he performed as a cardiac surgeon with NHI was in May, 1989, approximately five weeks before he opened his own office in Lincoln.

Dr. Morgenstern began his solo practice in Lincoln in July, 1989. Although Dr. Morgenstern performed little thoracic or vascular surgery during his association with NHI, he intended to perform thoracic, vascular and cardiac surgery in his solo practice. Dr. Morgenstern succeeded in his thoracic and vascular practice. Primary care physicians referred vascular patients directly to Dr. Morgenstern for surgery. Primary care physicians and pulmonologists referred thoracic patients to Dr. Morgenstern for surgery. In both of these areas, Dr. Morgenstern received referrals for surgery well in excess of the numbers of those surgeries he performed while associated with NHI.

With respect to cardiac surgery, however, his practice virtually ceased. During the nine months he was actively engaged in the practice of cardiac surgery after he left NHI, he performed a total of six cardiac surgeries. Not one of these patients was referred to him by the cardiologists associated with NHI.

In February, 1990, Dr. Morgenstern filed an action against respondents in the United States District Court for the District of Nebraska. Federal court jurisdiction was premised on 15 U.S.C. §§ 15 and 26 and on 28 U.S.C. § 1337. Dr. Morgenstern sought damages and injunctive relief for violations of Sections 1 and 2 of the Sherman Act and other ancillary state statutes. The matter was tried before a jury in November and December, 1991. Prior to submitting the case to the jury, Dr. Morgenstern dismissed all of his claims except the claim premised on actual monopolization under Section 2 of the Sherman Act. A mistrial was declared in January, 1992 because the jury was unable to reach a verdict.

The parties agreed to conduct the second trial before a "blue-ribbon" jury in order to obtain a panel capable of understanding the issues in the case. A questionnaire was sent to each member of the jury pool. Responses to the questionnaires were reviewed by the trial judge and counsel for the parties, and prospective jurors were identified who possessed qualifications which would make them better able to decide the case. The jurors who served on the jury were selected from this panel.

The Court prepared Interrogatories to be answered by the jury along with a general verdict. App. at 43-45. One of the interrogatories specifically asked the jury to identify the relevant geographic market which had been established by the evidence. App. at 43. The jury returned a verdict in favor of Dr. Morgenstern finding that respondents had willfully monopolized the market for adult cardiac surgery, and awarded him untrebled damages in the amount of $1,467,000. With respect to the relevant geographic market, the jury specifically found that the

market served by the respondents did not include Omaha.[2]

Respondents timely filed a Rule 50 Motion for Judgment as a Matter of Law and a Rule 59 Motion for New Trial in which they asserted the evidence established, as a matter of law, that Lincoln and Omaha were in the same geographic market, and that no reasonable jury could find otherwise. In addition, they claimed they were entitled to a new trial on the issue of damages. The trial judge overruled both of respondents' claims with respect to the geographic market, but granted them a new trial on the issue of damages. App. at 23, 30 and 33. The trial judge also entered an Order for Injunctive Relief; however, by its own terms, it did not become final until sixty days following the completion of the appellate process in the matter. App. at 35.

On appeal, the Eighth Circuit Court of Appeals reversed the jury verdict and entered a judgment in favor of the respondents. The court of appeals concluded it had jurisdiction under 28 U.S.C. § 1292(a)(1) because Judge Urbom "granted" an injunction to Dr. Morgenstern. App. at 6-7. The Court of Appeals then concluded that the

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[2] The jury did not simply accept the geographic market defined by either of the experts. The jury identified twenty-six counties in Nebraska, including Lancaster county which contains Lincoln, as the relevant geographic market in which the respondents performed adult cardiac surgery. This definition was larger than the market defined by Dr. Morgenstern's expert. Despite the jury's expansion of the geographic market, it still did not include Omaha.

"blue-ribbon" jury and Judge Urbom incorrectly determined that Lincoln and Omaha were in separate geographic markets. Under the facts as the Court of Appeals analyzed them, Lincoln and Omaha were in the same geographic market, and within that geographic market, "no permissible inference of monopoly power can be drawn. Absent monopoly power, Morgenstern's monopoly claim must fail." App. at 13.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DID NOT HAVE JURISDICTION UNDER 28 U.S.C. § 1292(a)(1) TO DETERMINE THE APPEAL.

This case presents two important issues regarding the scope of jurisdiction of courts of appeals under 28 U.S.C. § 1292(a)(1). The first issue relates to whether an injunction was "granted" in the case at hand for purposes of that statute. In addition, this case presents the Court the opportunity to resolve a split of authority among the circuits regarding the proper application of the test for appealability of an interlocutory order which this Court established in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981).[3]

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[3] Appellate jurisdiction is statutorily derived. "This Court . . . is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system." *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181 (1955), *overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988).

A. The District Court did not "grant" an injunction to petitioner.

The appeal in this case was premised on the Order for Injunctive Relief entered by Judge Urbom on April 26, 1993.[4] App. at 5. That Order stated that respondents "are permanently enjoined, as follows: within sixty (60) days after this order becomes final following completion of the appellate process. . . . " If it became final, the Order required respondents to divest themselves of common ownership of NHI. The appellate court held that the Order for Injunctive Relief "granted" an injunction to Dr. Morgenstern and therefore afforded the appellate court jurisdiction under 28 U.S.C. § 1292(a)(1).[5] The Court of

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[4] Although it was entered after trial and addressed permanent relief, the Order for Injunctive Relief was an interlocutory order since the district court granted Respondents a new trial on the issue of damages. 15B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3915.5, at 300-301 (1992) ("Federal Practice") ("The rule that an order granting a new trial is not final is applied in many contexts. Appeal cannot be taken . . . if the new trial is limited to issues of damages. The order is so clearly not final that an attempted appeal does not defeat the trial court's jurisdiction to continue proceedings.").

[5] To support its claim of jurisdiction, the Court of Appeals asserted that "[t]he district court imposed upon defendants an affirmative obligation, and then stayed that obligation pending appellate review." App. at 7. In analogous situations, courts have rejected appellate jurisdiction based upon an order which has been stayed. *See, e.g., Live and Let Live, Inc. v. Carlsberg Mobile Home Properties, Ltd.-'73*, 592 F.2d 846 (5th Cir. 1979) (District court entered judgment on jury verdict, but specifically stayed execution pending resolution of post-trial matters; the Fifth Circuit held that because of the stay, the order did not become

Appeals erred in accepting jurisdiction of the appeal. On its face, the Order for Injunctive Relief did not "grant" Dr. Morgenstern the injunction he requested.

The interlocutory appeals statute, 28 U.S.C. § 1292(a)(1), is an exception to the long-standing rule that only final judgments can be appealed. *Baltimore Contractors, supra.* The purpose of allowing an immediate appeal from an order which grants an injunction was "to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contractors,* 348 U.S. at 181. In determining whether a particular appeal should be allowed under this statute, " 'courts have looked to the presumed purpose of . . . the exception to the historical rule prohibiting appeals from non-final judgments.' " *Hershey Foods Corp. v. Hershey Creamery Co.,* 945 F.2d 1272, 1276 (3d Cir. 1991) (quoting *Stateside Machinery Co. v. Alperin,* 526 F.2d 480, 482 (3d Cir. 1975)). "Each exception to the final judgment rule . . . is to be construed so as to confine its application to the needs that inspired it." *Commodity Futures Trading Commission v. Preferred Capital Investment Co.,* 664 F.2d 1316, 1319 (5th Cir. 1982).

The interlocutory appeals statute provides appellate jurisdiction for any interlocutory order of a district court "granting, continuing, modifying, refusing or dissolving injunctions." The statute does not, however, define the term "injunction." For purposes of this statute, "[a]n affirmative definition is harder to achieve than a list of

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final and, therefore, did not provide appellant a basis for appeal).

exclusions. . . . If an affirmative definition must be attempted, it would define injunctions for this purpose as orders that are directed to a party, *enforceable by contempt*, and designed to accord or protect 'some or all of the substantive relief sought by a complaint' *in more than preliminary fashion.*" 16 *Federal Practice* § 3922, at 29 (emphasis added). *See also Cohen v. Board of Trustees*, 867 F.2d 1455, 1465 (3d Cir. 1989) ("This distinction further defines what is an injunction for purposes of section 1292(a)(1). The order must not only adjudicate some of the relief sought in the complaint; it must also be of such a nature that if it grants relief it could be enforced pendente lite by contempt if necessary."); *Lewis v. Tobacco Workers Intern. Union*, 577 F.2d 1135, 1139 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979) (order which requires present affirmative action or restraint is an injunction under § 1292(a)); 16 *Federal Practice* § 3924, at 69 ("There should not be any doubt that an injunction has been 'granted' by an order that takes immediate effect.")[6] "What is determinative is that the order *can* be immediately enforced." *Cohen*, 867 F.2d at 1466 (emphasis in original).

The Order for Injunctive Relief in the case at hand lacked the most basic element of all – a presently enforceable obligation against respondents. In deciding whether a particular order is an injunction, courts "look to the substance, rather than the form, of an order." *Lewis*, 577 F.2d at 1139. The order appeared in the form of an injunction, but substantively, respondents were neither required to take nor precluded from taking any action until sixty

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[6] Conversely, an order that does not take immediate effect should not constitute the "grant" of an injunction.

days following completion of the appellate process. Until the appellate process was completed, which, of course, could have been years into the future, petitioner could not invoke the contempt powers of the court to require respondents to comply with the order.

To paraphrase this Court's decision in *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742 (1976): "It is obvious from the District Court's order that [petitioner], although having received a favorable ruling on the issue of [respondents'] liability to [him], received none of the relief which [he] expressly prayed for in [his complaint]. [He] requested an injunction, but did not get one; [he] requested damages, but [was] not awarded any; [he] requested attorneys' fees, but received none." Under these circumstances, it is superficial to suggest that the trial court "granted" an injunction to petitioner thereby permitting respondents to appeal on an interlocutory basis.[7]

This case presents the Court with an appropriate opportunity to define whether an order which imposes no presently enforceable obligations on the parties constitutes the "grant" of an injunction for purposes of the

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[7] Since petitioner obtained no presently enforceable relief under the Order for Injunctive Relief, it is more appropriate to view the Order as the denial of petitioner's requested injunctive relief, which was for an immediately effective prohibition. This may have provided petitioner the right to seek appellate review, but respondents cannot rely on such a denial as the jurisdictional basis for their appeal. *See, e.g., Liberty Mutual*, 424 U.S. at 744-45.

interlocutory appeal statute. In addition, this case presents the opportunity for the Court to clarify the circumstances in which the "serious, perhaps irreparable, consequence" test established in *Carson v. American Brands, Inc., supra,* is to be applied.

B. The Court of Appeals failed to apply the *Carson* test to determine its jurisdiction to hear the appeal on an interlocutory basis.

In *Carson,* this Court analyzed appellate jurisdiction under 28 U.S.C. § 1292(a)(1) and concluded that "[u]nless a litigant can show that an interlocutory order of the district court might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal." *Carson,* 450 U.S. at 84. The *Carson* test has been applied inconsistently by various circuit courts, and even by different panels within the same circuit. Some circuits apply the *Carson* test to all appeals under § 1292(a)(1), while other circuits do not apply the test when the interlocutory order is based upon the merits of the claim. Application of the *Carson* test has been further complicated by a split of authority among the circuits regarding whether the test applies to all interlocutory orders, including those which expressly grant or deny injunctive relief, or only to those interlocutory orders which merely have the effect of granting or refusing an injunction. The facts in the case at hand permit the Court to address both of these issues and resolve these conflicts among the circuits.

In *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1238-39 (7th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986), the court discussed at length the split of authority regarding whether the *Carson* test should be applied to interlocutory orders which are entered based upon the merits of the claim:

> In *Carson*, the Court held that an interlocutory order of a district court is immediately appealable under section 1292(a)(1) only if the appellant demonstrates that the order has a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal. . . . Although this two-part test seems straightforward, there is some disagreement – both among circuits and within this circuit – as to whether *Carson* applies when the interlocutory order addresses the merits of the claim. . . .
>
> [S]everal courts, including a panel of this circuit, have read *Carson* narrowly to apply only to interlocutory orders that did not reach the merits of appellants' claims or did not dispose of all requests for injunctive relief. *See Winterland Concessions Co. v. Trela*, 735 F.2d 257, 260-61 (7th Cir. 1984); *Center for National Security Studies v. Central Intelligence Agency*, 711 F.2d 409, 412 (D.C. Cir. 1983); *Tokarcik v. Forest Hills School District*, 665 F.2d 443, 446-47 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 . . . (1982). These courts rely on *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S 430, 433 . . . (1932), for the rule that an interlocutory order disposing of all requests for injunctive relief and addressing the merits of the case is immediately appealable under section 1292(a)(1) and [*Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978)] and

Carson for the proposition that an order either not disposing of all requests for injunctive relief or not addressing the merits is immediately appealable only if the appellant shows a "serious, perhaps irreparable, consequence" that can be effectually challenged only by immediate appeal. . . .

Other courts, including a different panel of this circuit, have held that *Carson* prescribes a broad rule applicable to all appeals under section 1292(a)(1) – whether or not the district court addressed the merits of the appellant's claim. *See Carson*, 450 U.S. at 84 . . . ; [*South Bend Consumers Club, Inc. v. United Consumers Club, Inc.*, 742 F.2d 392, 393-94 (7th Cir. 1984)]; *see also United States v. RMI Co.*, 661 F.2d 279, 281-82 (3d Cir. 1981); *Gould v. Control Laser Corp.*, 650 F.2d 617, 621 (5th Cir. 1981). This position is supported by the Supreme Court's suggestion in *Carson* that each of the prior cases on appellate jurisdiction under section 1292(a)(1) could be explained in terms of the "serious, perhaps irreparable, consequence" requirement. *Carson*, 450 U.S. at 84-86 . . . ; *see Donovan v. Robbins*, 752 F.2d 1170, 1173-74 (7th Cir. 1985). Indeed, the Court even suggested that *Marvel*, the case now used as the basis for the "merits" distinction, reflected a finding by the Court that "serious, perhaps irreparable, consequence" would have resulted without an immediate appeal. *Carson*, 450 U.S. at 86 n.11 . . . ; *see also Shirey v. Bensalem Township*, 663 F.2d 472, 477 (3d Cir. 1981).[8]

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[8] The court in *Brown* did not have to choose between these inconsistent positions "because in the present case the two analyses yield the same result." *Brown*, 767 F.2d at 1239.

In the case at hand, the Order for Injunctive Relief was entered after a full trial and certainly addressed the propriety of injunctive relief on the merits. Petitioner filed a Motion to Dismiss with the court of appeals and requested that the court apply the "serious, perhaps irreparable, consquence" requirement and dismiss respondents' interlocutory appeal. The Court declined because it held that *Carson* was inapplicable. This case presents an example of why the *Carson* test should be applied to all interlocutory appeals, including those where the court addresses the issue on the merits. Had the *Carson* test been applied in the case at hand, it is inconceivable that respondents could have met their burden to show the requisite consequences. If, therefore, interlocutory appeals are to be restricted to those situations where they are necessary, application of the *Carson* test to all such appeals will insure the proper result.

In addition to the "merits" distinction, some circuit courts apply the *Carson* test to those interlocutory orders which have the practical effect of granting or denying injunctive relief, but do not apply the test to those orders which expressly grant or deny such relief. In the case at hand, the court of appeals adopted this approach. App. at 5-6. Other courts have applied the *Carson* test to orders which actually grant or deny injunctive relief on an interlocutory basis. *See, e.g., Williams Electronics, Inc. v. Artic International, Inc.*, 685 F.2d 870, 871 (3d Cir. 1982) ("[B]ecause the injunction granted by the district court goes to the merits of the dispute and has 'serious, perhaps irreparable, consequences', the order can be considered a 'routine interlocutory injunctive order' and

appealable under 28 U.S.C. § 1292(a)(1)."). Although *Carson* itself involved an order than denied a consent decree, which the Court indicated had the practical effect of denying injunctive relief, the Court's analysis of § 1292(a)(1) did not expressly limit application of the test it developed to "practical effect" orders:[9]

> Because § 1292(a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly to ensure that appeal as of right under § 1292(a)(1)

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[9] Subsequent opinions from this Court have not clarified the appropriate application of the *Carson* test in a case like this one. In *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987), the Court noted: "Even if we were convinced that the District Court order had the effect of denying an injunction, it still would not satisfy § 1292(a)(1). This Court has made it clear that not all denials of injunctive relief are immediately appealable; a party seeking review also must show that the order will have " 'serious, perhaps irreparable, consequences,' and that the order can be 'effectually challenged' only by immediate appeal." *Id.* at 379. *Stringfellow* leaves unanswered the question of whether an order which expressly denies a request for an injunction must also comply with the *Carson* test. Furthermore, in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), wherein the Court overruled the Enelow-Ettelson rule, the Court further noted: "This holding will not prevent interlocutory review of district court orders when such review is truly needed. Section 1292(a)(1) will, of course, continue to provide appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have "serious, perhaps irreparable, consequence." *Id.* at 287-88. It is unclear in *Gulfstream* whether the "serious, perhaps irreparable, consequence" language modifies both types of orders discussed in the sentence, or only orders that have the practical effect of granting or denying injunctions.

> will be available only in circumstances where an appeal will further the statutory purpose of "[permitting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc. v. Bodinger,* supra, at 181. Unless a litigant can show that an interlocutory order of the district court might have a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.

It is an artificial distinction drawn by the court of appeals in the case at hand and some other circuit courts between orders which expressly grant or deny injunctive relief and those which simply have the practical effect of doing so, particularly with respect to those orders which *grant* such relief. The basis for creating the exception to the final judgment rule for interlocutory grants or denials of injunctive relief was because such relief may cause irreparable damage. *Baltimore Contractors,* 348 U.S. at 181 ("No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history [of the statutes permitting interlocutory appeals], although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence."). *See also Commodity Futures Trading Commission,* 664 F.2d at 1319 n. 4 ("Interlocutory *grants* of *permanent* injunctive relief are also appealable because, when an injunction has been granted by an order that takes immediate effect, irreparable damage may be inflicted.") (emphasis in original). As a result, application of the

Carson test to orders expressly granting injunctive relief, as well as those having the practical effect of doing so, is appropriate. In the majority of instances, application of the *Carson* test will support appellate jurisdiction; however, in instances like the case at hand, proper application of the *Carson* test will prevent an appellate court from accepting jurisdiction of an interlocutory order which does not inflict serious consequence.

The Court should grant the petition and resolve the multiple conflicts among the circuits regarding proper application of the *Carson* test.

II. THE COURT OF APPEALS IMPROPERLY DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO HAVE THE JURY MAKE FACTUAL DETERMINATIONS.

This is an antitrust case with issues of first impression.[10] A blue-ribbon panel of jurors was specially selected to decide the complex issues involved in this lawsuit. The parties took diametrically opposed positions regarding whether Lincoln and Omaha are in separate geographic markets for purposes of adult cardiac surgery. The second trial lasted twenty-four days. Forty-three witnesses testified at the second trial, many about facts relevant to the geographic market involved in this lawsuit. The parties retained qualified expert economists

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[10] The court of appeals in the case at hand noted three legal issues which had not expressly been addressed by any other circuit court. App. at 8 n.2.

who rendered contradictory opinions regarding the presence of Lincoln and Omaha in the same geographic market. The jury was given instructions on the issue of the relevant geographic market which correctly stated the law applicable to a determination of the relevant geographic market.[11] The jury made a special finding that the relevant geographic market applicable to this case did not encompass both Lincoln and Omaha. An experienced United States District Court judge on multiple occasions rejected the arguments of respondents that there were insufficient facts to support and/or that no reasonable jury could find that Lincoln and Omaha were in separate geographic markets.

Despite all of these factors, the court of appeals rejected the market defined by the jury and accepted by the trial judge, and instead concluded that Lincoln and Omaha were in the same geographic market.

The court of appeals decided the case under an improper legal standard, ignored substantial evidence supporting petitioner's claimed geographic market and further ignored case law and commentary regarding the proper elements to consider in defining a relevant geographic market for monopolization purposes. As a result,

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[11] The applicable jury instruction stated, in part: "The relevant geographic market is the area in which the defendants face competition from physicians who supply competing services that are in the relevant product market, *and to which a patient can practicably turn for service.*" App. at 41 (emphasis added). The court of appeals' decision was premised on its conclusion that patients could practicably turn to Omaha for services. The jury was appropriately instructed to consider this factor; however, after considering all of the evidence, it concluded otherwise.

the court deprived petitioner of his constitutional right to factual determinations by the jury.

"In the federal system, the Constitution itself commits the trial of facts in a civil cause to the jury. Should either party to a cause invoke its Seventh Amendment right, the jury becomes the principal factfinder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict. The jury's factual determinations as a general rule are final." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 625-26 (1991). On multiple occasions, this Court has chastised lower courts for interfering with the factfinding mission of the jury. "[T]he respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury." *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946). A jury's factfinding responsibilities are not without constraint; however, "[o]nly when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Id.* at 650.

To protect the constitutional right to have a jury make appropriate factual determinations, courts place a

significant burden on a party who seeks to reverse those determinations:

> In reviewing the denial of a motion for judgment notwithstanding a jury verdict, we must view the evidence and all reasonable inferences in the light most favorable to the party who prevailed before the jury. In doing so, we
>
> > (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tends to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d 323 (8th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988). Furthermore, in an antitrust case, when a court examines the evidence, it should refrain from "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 699 (1962).

In the case at hand, the court of appeals failed to abide by these rules and further failed to acknowledge this Court's and other courts' and commentators' guidance on the elements to examine in defining a relevant geographic market:

A. In *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), the Court recognized the importance of distance in defining the relevant geographic market for banking: "In

banking, as in most service industries, convenience of location is essential to effective competition. . . . The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries." *Id.* at 358. In the instant case, petitioner presented evidence that distance was important in the selection of a location at which to undergo cardiac surgery. Indeed, distance alone could account for where 90% of the patients underwent cardiac surgery in the data examined by the experts in this case. Furthermore, several primary care physicians testified that their patients preferred to be treated at the closest locations.

B. The merits of the Elzinga-Hogarty test in defining geographic markets was recognized by the court in *United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990). Here, petitioner's expert utilized this test in defining the applicable geographic market and concluded that Lincoln and Omaha were in separate geographic markets.

C. Commentators have recognized that limitations on access to information can impact the definition of relevant markets in antitrust cases. *See, e.g.*, Lawrence A. Sullivan, *Antitrust* § 19, at 67 (1977); Kenneth Elzinga & Thomas Hogarty, *The Problem with Geographic Market Delineation in Antimerger Suits*, 18 The Antitrust Bulletin 45 (1973). Substantial evidence was introduced by

> petitioner in this case that patients and primary care physicians do not possess the information necessary to make informed decisions about the quality of care they receive in cardiac surgery. Physicians testified that patients and primary care physicians defer to the cardiologists to monitor the quality of the cardiac surgeons who operate on them or their patients; yet despite the fact that respondents were aware of quality problems in Lincoln, they failed to inform either their patients or primary care physicians.

The court of appeals offered as justification for its holding that patients "could practicably turn" to Omaha for an alternative supply of cardiac surgery if they were dissatisfied with the care they were receiving in Lincoln. Therefore, the court claimed, Lincoln and Omaha are in the same geographic market. The court's justification is directly contradicted by much of the evidence discussed above. Moreover, taken to its logical conclusion, the court's holding would create at least a nationwide geographic market for cardiac surgery. Under the court's analysis, it is difficult to conceive of a smaller geographic market for any medical service offered on an elective basis. Nevertheless, there has been at least one case in the area of cardiac surgery alone which disproves the position advanced by the court in the case at hand. In *Robinson v. Magovern*, 521 F. Supp. 842, *aff'd*, 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982), the court defined a geographic market which comprised 16 counties in and around, but not including, Pittsburgh, Pennsylvania.

There has been an increasing tendency of some federal courts recently to invade the legitimate province of juries in antitrust cases and to second-guess their findings on key elements of the plaintiff's case.[12] The instant case, where specific instructions were given and findings made, offers a particularly appropriate vehicle to instruct those courts that where there is evidence to support the jury's determination, it must prevail.

CONCLUSION

The petition should be granted, the court of appeals reversed and the jury verdict reinstated. Alternatively, the Court should grant the writ, apply the *Carson* test to the Order for Injunctive Relief, reverse the court of appeals, and instruct it to dismiss the appeal as premature.

Respectfully submitted,

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[12] *E.g., Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1307 (1994); *The Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2163 (1994); *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir.), *cert. denied*, 498 U.S. 855 (1990).

APPENDIX TABLE OF CONTENTS

Page

A. *Dan A. Morgenstern v. Charles S. Wilson, et al.* Eighth Circuit Opinion, July 20, 1994..... App. 1

B. Memorandum and Order on Motion for Judgment as a Matter of Law, April 26, 1993. *Dan A. Morgenstern v. Charles S. Wilson, et al.*..... App. 14

C. Memorandum and Order on Defendants' Motion for New Trial, April 26, 1993. *Dan A. Morgenstern v. Charles S. Wilson, et al.*..... App. 24

D. Order for Injunctive Relief, April 26, 1993. *Dan A. Morgenstern v. Charles S. Wilson, et al.*... App. 35

E. *Dan A. Morgenstern v. Charles S. Wilson, et al.* Eighth Circuit Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc, September 9, 1994..... App. 38

F. Judgment entered by the District Court on September 29, 1994. *Dan A. Morgenstern v. Charles S. Wilson, et al.*..... App. 39

Portions of the Final Jury Instructions .....App. 40

Interrogatories.....App. 43

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2446

Dan A. Morgenstern, M.D., Plaintiff - Appellee, v. Charles S. Wilson, M.D.; Deepak Gangahar, M.D.; Herbert E. Reese, M.D.; Walt F. Weaver, M.D.; Christopher C. Caudill, M.D.; Joseph R. Gard, M.D.; Sabyasachi Mahapatra, M.D.; Robert J. Buchman, M.D.; Michael A. Breiner, M.D.; Alan D. Forker, M.D.; Stephen W. Carveth, M.D., Defendants - Appellants. Cardiovascular & Thoracic Surgery, P.C.; Cardiology Consultants, P.C., Defendants. Nebraska Heart Institute, P.C., Defendant - Appellant.	*	Appeal from the United States District Court for the District of Nebraska

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Submitted: March 14, 1994

Filed: July 20, 1994

Before McMILLIAN and WOLLMAN, Circuit Judges, and VIETOR,* District Judge.

McMILLIAN, Circuit Judge.

Charles S. Wilson, M.D., and others, (hereinafter referred to as defendants), appeal from an interlocutory order entered in the United States District Court for the District of Nebraska compelling either the dissolution or the restructuring of the Nebraska Heart Institute (NHI). *Morgenstern v. Wilson*, Civ. No. 90-L-34 (D. Neb. Apr. 26, 1993). For reversal, defendants argue the district court erred in granting an injunction because (1) several legal theories of anti-competitive conduct that were presented to the jury were erroneous as a matter of law, and (2) there was insufficient evidence to support the jury's verdict that Wilson, along with the associated cardiac surgeons, thoracic and vascular surgeons, and cardiologists who comprised NHI, violated § 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. Appellee Dan A. Morgenstern, M.D., filed a motion to dismiss the appeal for lack of appellate jurisdiction. For the reasons discussed below, we reverse the judgment of the district court.

I.

In 1987, NHI, a professional corporation, was formed in Lincoln, Nebraska, to provide administrative, clinical and marketing services to its members. The members of

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*The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa, sitting by designation.

NHI were Cardiology Consultants, P.C. (CCPC), a group cardiology practice consisting of six cardiologists, and Cardiovascular & Thoracic Surgery, P.C. (CVTS), a cardiac surgical group practice comprised of three cardiac surgeons and two thoracic and vascular surgeons. The cardiologists of CCPC referred their patients in need of open-heart surgery, angioplasty, and other cardiac surgical procedures to the surgeons of CVTS.

In July 1987 CVTS employed Morgenstern as a cardiac surgeon. After practicing one year with CVTS, CVTS informed Morgenstern that he would not be made a partner with the group. However, at Morgenstern's request, his employment contract with CVTS was extended for a second year during which he continued to perform cardiac surgical procedures on patients referred to CVTS by CCPC. While associated with NHI as a member of CVTS, Morgenstern performed approximately 180 cardiac surgeries.

Upon leaving CVTS in 1989, Morgenstern opened his own cardiac surgery practice in Lincoln. Although the thoracic and vascular aspects of Morgenstern's practice thrived, Morgenstern's cardiac surgery practice failed. During the nine months he practiced cardiac surgery after leaving CVTS, he performed only six surgeries. None of the six patients was referred to Morgenstern by CCPC.

Morgenstern filed suit in federal district court against NHI, CCPC, CVTS, and the individual cardiologists and surgeons affiliated with those groups, alleging numerous violations of the Sherman Antitrust Act. After abandoning his conspiracy to monopolize claim under § 1 of the

Sherman Antitrust Act, and attempted monopolization and conspiracy to monopolize claims under § 2 of the Sherman Antitrust Act, Morgenstern proceeded to trial solely on a claim of actual monopolization of cardiac surgery pursuant to § 2. The jury failed to reach a verdict, and the district court ordered a new trial on the actual monopolization claim. The district court denied defendants' motion for judgment as a matter of law.

Following the second trial, the jury exonerated CCPC and CVTS of liability, but found the individual physicians and NHI liable for monopolizing the "adult cardiac surgery market." The jury found that Morgenstern had suffered $1,467,000 in damages as a result of the formation of NHI and the failure of the cardiologists to refer patients to Morgenstern, or their referral of patients only to the surgeons associated with NHI. The district court, denying defendants' renewed motion for judgment as a matter of law, upheld the jury's verdict on a theory of "monopolization by combination of individuals and corporations, acting in concert." However, the district court found insufficient evidence to support the jury's award of damages and granted a new trial on that issue. The district court, implementing the jury's verdict on liability, granted injunctive relief to Morgenstern pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26, and ordered defendants to dissolve or restructure NHI to eliminate common ownership by cardiologists and surgeons and to prevent joint marketing on behalf of CCPC and CVTS. This appeal by defendants followed. Morgenstern filed a motion to dismiss the appeal for lack of appellate jurisdiction.

II.

We consider first our appellate jurisdiction. Morgenstern argues that the injunction in question, implementing the jury's verdict, is not an appealable interlocutory decision within the provisions of 28 U.S.C. § 1292(a)(1). We disagree.

Section 1292(a) provides, in pertinent part, that "the courts of appeal shall have jurisdiction of appeals from: (1) [i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions." Thus, by the plain language of § 1292(a), interlocutory orders granting "injunctions" are appealable. Nevertheless, Morgenstern argues that, under *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) (*Carson*), unless a litigant is able to show that an interlocutory order of the district court (1) will have serious, perhaps irreparable, consequences, and (2) the order can be effectually challenged only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal. Morgenstern contends that, because the order at issue in the present case does not require defendants to take any action until sixty days "following completion of the appellate process," it fails both prongs of the *Carson* test.

We believe Morgenstern misunderstands the law developed on § 1292(a) appeals. Section 1292(a) invokes two separate avenues of analysis. The United States Supreme Court has stated that § 1292(a)(1) provides appellate jurisdiction for "orders that grant or deny injunctions" as well as those "orders that merely have the practical effect of granting or denying injunctions and

have 'serious, perhaps irreparable, consequence.' " *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287-88 (1988), quoting *Carson*, 450 U.S. at 84. Thus, the first question that must be addressed "is whether the order appealed from specifically [granted or] denied an injunction or merely had the practical effect of doing so." *Kausler v. Campey*, 989 F.2d 296, 298 (8th Cir. 1993) (*Kausler*). We are in accord with the majority of circuits which have held that, if an interlocutory order expressly grants or denies a request for injunctive relief, the *Carson* requirements need not be met and the order is immediately appealable as of right under § 1292(a)(1). *See, e.g., MAI Basic Four, Inc. v. Basic, Inc.*, 962 F.2d 978, 982 (10th Cir. 1992); *Sherri A.D. v. Kirby*, 975 F.2d 193, 203 (5th Cir. 1992); *United States v. Bayshore Assocs.*, 934 F.2d 1391, 1395-96 (6th Cir. 1991); *Cohen v. Board of Trustees*, 867 F.2d 1455, 1466 (3d Cir. 1989); *International Ass'n of Machinists & Aerospace Workers v. Eastern Airlines, Inc.*, 849 F.2d 1481, 1486 n.11 (D.C. Cir. 1988); *Donovan v. Robbins*, 752 F.2d 1170, 1173-74 (7th Cir. 1985); *Cable Holdings of Battlefield, Inc. v. Cooke*, 764 F.2d 1466, 1471 (11th Cir. 1985). By contrast, if an order merely has the practical effect of granting or denying an injunction, the *Carson* irreparable injury test must be satisfied. *Kausler*, 989 F.2d at 298.

In determining whether the district court acted specifically to grant injunctive relief, we examine "the language of the order, the grounds on which it rests, [and] the circumstances in which it was entered." *Kausler*, 989 F.2d at 299. An examination of the district court's order reveals that the district court explicitly granted Morgenstern injunctive relief, and, thus, *Carson* is inapposite. The district court order, styled as "Order for Injunctive

Relief," expressly granted the specific injunctive relief prayed for in Morgenstern's complaint. The district court stated that, in accordance with its "equitable powers" under 15 U.S.C. § 26,[1] defendants "are permanently enjoined as follows: within sixty days after this order becomes final following completion of the appellate process," (1) NHI shall be dissolved, or (2) restructured to eliminate common ownership by cardiologists and surgeons and to prevent joint marketing on behalf of CCPC and CVTS. The district court imposed upon defendants an affirmative obligation, and then stayed that obligation pending appellate review. The district court specifically granted Morgenstern the injunctive relief he requested, and, therefore, we conclude that we have jurisdiction over the present appeal as one coming within the parameters of § 1292(a)(1). Accordingly, we deny Morgenstern's motion to dismiss the appeal.

III.

We now turn to the merits of defendants' appeal. For reversal, defendants argue that several of the legal theories of anti-competitive conduct that were presented to the jury were erroneous as a matter of law, and that there was insufficient evidence to support the jury's verdict that NHI, and the individual physicians who comprise NHI, violated § 2 of the Sherman Antitrust Act, 15 U.S.C.

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[1] 15 U.S.C. § 26 provides, in pertinent part, that any "person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws."

§ 2. Because we conclude that Morgenstern produced insufficient evidence of defendants' anti-competitive power within a well-defined relevant geographic market, we reverse the judgment of the district court.[2]

To establish that defendants have the market power required for monopolization liability, Morgenstern had to establish that defendants have "a dominant market share in a well-defined relevant market." *Flegel v. Christian Hosp., Northeast-Northwest,* 4 F.3d 682, 689 (8th Cir. 1993) (quoting *Assam Drug Co. v. Miller Brewing Co.,* 798 F.2d

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[2] Our resolution of the issue of the relevant geographic market has made it unnecessary for us to reach all of the issues presented on appeal. Defendants raise several challenges to the theories of liability upon which the present case was submitted to the jury. Defendants first argue that, as a matter of law, a medical referral from one specialist to another is an act of medical judgment and cannot support antitrust liability. Defendants also argue that an actual monoplization claim must be predicated on the market domination of a single defendant or single economic entity and cannot be established by combining the market power of multiple defendants. There is a split in authority on this question. *See generally* Julian O. von Kalinowski, Antitrust Laws and Trade Regulation §§ 17.01[2], 19.06 (1993); II E. Kinter, Federal Antitrust Law, § 16.2, at 482 (1980) (indicating that several firms acting in concert can be guilty of actual monopolization). Defendants further contend that, if this Court recognizes such a joint monopolization claim, it should treat such a claim as a conspiracy to monopolize claim, and, thus, require an agreement among defendants to commit an anti-competitive act. The jury in the present case was not instructed regarding the finding of an agreement. We are cognizant that no circuit has squarely addressed these questions. Even were we to rule in Morgenstern's favor on these issues, defendants would still be entitled to judgment in their favor. We consequently leave resolution of these issues for an appropriate case.

311, 318 (8th Cir. 1986)). The "relevant market" is defined in terms of both product market (here, adult cardiac surgery) and geographic market. An actual monopolization claim often succeeds or fails strictly on the definition of the product or geographic market. *Alexander v. National Farmers Organization*, 687 F.2d 1173, 1181 (8th Cir. 1982) (citing Julian O. von Kalinowski, Antitrust Laws and Trade Regulation, §§ 8.02[3]c, 9.01[3] (1982) (collecting cases)), *cert. denied*, 461 U.S. 937 (1983).

The geographical market encompasses the geographic area to which consumers can practicably turn for alternative sources of the product and in which the antitrust defendants face competition. *Baxley-DeLamar Monuments, Inc., v. American Cemetery Ass'n*, 938 F.2d 846, 850 (8th Cir. 1991). The burden of establishing that a specified area constitutes a relevant geographic market in a particular case rests with the plaintiff. *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

In the present case, Morgenstern proposed a relevant market of patients of adult cardiac surgery to include Lincoln and twenty-six surrounding Nebraska counties extending in certain directions over 200 miles beyond Lincoln. However, Morgenstern's relevant geographic market excluded the heart programs in Omaha and all other regional and national heart programs. Defendants' relevant geographic market included, at a minimum, Omaha. The question before this Court is whether Morgenstern provided sufficient evidence from which the

jury could reasonably have found that defendants possessed market power within the relevant geographic market.[3]

A close examination of the record reveals that Morgenstern's evidence regarding the relevant geographic market failed to address a critical legal question: where could consumers of the product (adult cardiac surgery) *practicably turn for alternative sources of the product. See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 331-32 (1961) (defining the relevant geographic area as "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies"). The evidence provided by Morgenstern to support his geographic market definition consisted primarily of expert

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[3] Within the relevant geographic market found by the jury (Lincoln and twenty-six surrounding counties, but not including Omaha), defendants possessed close to eighty percent of the market share of the patients. An eighty percent market share is within the permissible range from which an inference of monopoly power can be drawn. If, as defendants contend, the relevant geographic market includes Omaha, then defendants have only a thirty percent market share. As a matter of law, absent other relevant factors, a thirty percent market share will not prove the existence of monopoly power. *See, e.g., Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 201 (3d Cir. 1992) (fifty-five percent market share is insufficient to constitute monopoly power), *cert. denied*, 113 S. Ct. 1285 (1993); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1984) (ninety percent is enough, sixty percent is not likely to suffice, and thirty-three is insufficient) (citations omitted); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981) (thirty percent market share insufficient), *cert. denied*, 455 U.S. 921 (1982); *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976) (forty-seven to fifty percent share in liquid propane gas market held insufficient), *cert. denied*, 429 U.S. 1122 (1977).

testimony regarding the residences of the cardiac surgery patients in the Lincoln and Omaha heart surgery programs, and the Nebraska counties that supplied the largest number of patients to each program. Morgenstern's proposed geographic market was also based upon evidence that cardiologists in Lincoln seldom refer their patients to cardiac surgeons in Omaha. Joint Appendix Vol. IV at 1692, 1791. Morgenstern's expert focused upon where Lincoln and Omaha residents *actually* went, as opposed to where they *could* practicably go, for their cardiac surgery services, and specifically presented insufficient evidence regarding whether or not CVTS patients could practicably turn for alternative sources of the product to Omaha or other more distant heart programs. Morgenstern's expert concluded that Lincoln and Omaha must be in different geographic markets "[b]ecause patients overwhelmingly went to the closest hospital." Brief for Appellee at 20. Morgenstern further provided no evidence that patients viewed Lincoln as a market separate from Omaha, located only fifty-eight miles from Lincoln.

The evidence produced in the present case falls far short of establishing Lincoln and surrounding counties, to the exclusion of Omaha, as the relevant geographic market. By contrast, the record shows that Omaha should have been included in the relevant geographic market definition. The Supreme Court has recognized the importance of distance and its counterpart convenience in determining the relevant geographic market. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 358 (1963). Defendants' evidence showed that Lincoln residents need travel only fifty-eight miles by main highway to receive

cardiac surgical care in Omaha. Morgenstern himself traveled from Lincoln to Omaha on more than thirty occasions in a single year to assist in performing cardiac surgery. The defendants also provided testimony from health care providers in various professions throughout Nebraska who uniformly confirmed the existence of vigorous competition between Lincoln and Omaha. Lincoln cardiologists and cardiac surgeons testified to strong competition between them and the six Omaha heart programs. Joint Appendix Vol. II at 810-18, 904, 979-80; Vol. III at 1174-76, 1215-17, 1466-68. Omaha cardiac surgeons and hospital administrators testified to strong competition from CVTS and the cardiologists of CCPC. Moreover, the evidence showed that, throughout Nebraska, primary care physicians considered both Lincoln and Omaha as feasible sources of healthcare when making recommendations to their patients in need of cardiac surgery services. Joint Appendix Vol. II at 766-72, 775, 935; Vol. III at 1079-83, 1227-28. In Lincoln itself, physicians would refer patients to Omaha if, in their medical judgment, better treatment was available there. Joint Appendix Vol. II at 777-80. Defendants' expert provided further corroborative evidence consisting of three distinct economic studies designed to determine reasonable, practicable substitutes for Lincoln's residents in need of cardiac surgery services. Each analysis concluded that the relevant geographic market consisted of, at a minimum, Lincoln and Omaha.

Morgenstern argues that market determination, including the relevant geographic market, is necessarily a factual question for the jury, and emphasizes that the jury evidently credited the testimony of Morgenstern's expert

and found the relevant geographic market to exclude Omaha. However, "[w]hen an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke Group v. Brown & Williamson Tobacco Co.*, 113 S. Ct. 2578, 2598 (1993). Morgenstern has failed to overcome the overwhelming evidence that cardiac surgery programs in Lincoln and Omaha occupy the same relevant geographic market. As discussed above in footnote three, within the properly defined relevant geographic market, no permissible inference of monopoly power can be drawn. Absent monopoly power, Morgenstern's monopoly claim must fail.

Accordingly, we reverse the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DAN A. MORGENSTERN, Plaintiff, vs. CHARLES S. WILSON, et al., Defendants.	)	CV90-L-34 MEMORANDUM AND ORDER ON MOTION FOR JUDGMENT AS A MATTER OF LAW (Filed Apr. 26, 1993)

Following a verdict for the plaintiff, the losing defendants have moved for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure.

I.

As I interpret the first thrust of the defendants' attack, it is that section 2 of the Sherman Act does not prohibit monopolization by a combination of individuals or corporations, acting in concert. Perhaps they are right, but I think not.

United States v. Crescent Amusement Co., 323 U.S. 166 (1944), and *United States v. Griffith*, 334 U.S. 100 (1948), recognized that monopolistic practices in violation of section 2 could be done by persons or companies working in concert or combination. That does not, as the defendants argue, fly in the face of the words of section 2, which include these:

> "Every person who shall monopolize . . . or combine . . . with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty. . . . "

15 U.S.C. § 2 (1973). It may be that the defendants are insisting that the only alternative we are permitted to examine is the word "monopolize" without the words "combine . . . to monopolize." Not so in this case, at least. The theory of the trial on the part of the plaintiff was, as stated in the instruction titled " 'DEFENDANTS' defined:"

> "To find liability on the part of any defendant or defendants you must find that the same individuals or corporation or corporations or a combination of individuals and corporations, acting in concert, have been shown to have done all three of the essential elements of monopolization, namely, (1) possessed monopoly power in a relevant market, (2) willfully maintained that power through restrictive or exclusionary conduct, and (3) injured the plaintiff in his business or property because of that restrictive or exclusionary conduct."

Nor is it necessary that each individual defendant have a monopoly. In *American Tobacco Co. v. United States,* 328 U.S. 781 (1946), where three manufacturers of cigarettes, together with a subsidiary of one of them and certain officials of others, were convicted of violating section 2 of the Sherman Act and the conviction upheld, none of the convicted companies by itself had a monopoly. It was the combination of the three that constituted the monopoly. While the defendants brand the *Griffith* and *American Tobacco* cases as "ancient cases" using "loose dicta," no other Supreme Court cases cited have rejected the concept that monopolization can occur by concerted action. To do so would bend out of shape the words of section 2 itself.

Neither *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), nor *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), relied upon by the defendants, holds to the contrary. It is true that *Copperweld*, quoting *Monsanto*, says, "the Sherman Act contains a 'basic distinction between concerted and independent action.' " But it goes on to say:

> "The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. . . .
>
> Section 1 of the Sherman Act in contrast, reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between *separate* entities. It does not reach conduct that is 'wholly unilateral.' *Albrecht v. Harold Co.*, 390 U.S. 145, 149 (1968); accord, *Monsanto Co. v. Spray-Rite Corp.*, *supra*, at 761."

What the court in *Copperweld* does not say is that section 2 does not encompass concerted activity. In footnote 13 the Court explains:

> "By making a conspiracy to monopolize unlawful, § 2 does reach both concerted and unilateral behavior. The point remains, however, that purely unilateral conduct is illegal only under § 2 and not under § 1. Monopolization without conspiracy is unlawful under § 2, but restraint of trade without a conspiracy or combination is not unlawful under § 1."

Id. at 767. There is no reason to think that in using the words "conspiracy to monopolize" the Court was eliminating the word "combination" that appears in section 2 as an alternative to "conspiracy."

In "Sixteen Business Organizations," Von Kalinowski, *Anti Trust Laws and Trade Regulation § 7.1[2]* (1979) appears the following:

> "The second major distinction between Sections 1 and 2 is that Section 1 is applicable exclusively to concerted activity, while Section 2 covers *individual*, as well as concerted, activity. Thus, actual monopolization may arise from either individual or concerted action. Attempted monopolization, which may theoretically stem from concerted as well as individual action, is usually charged only in cases of individual action. Combinations or conspiracies to monopolize apply, by definition, only to concerted activity."

II.

Secondly, the defendants assert that, if a monopolization by concerted action can exist, it requires proof that the individual defendants formed an "agreement" to commit the predatory acts on which liability is based. They reach this proposition by citing section 1 of the Sherman Act and then arguing that the actual monopolization clause of section 2, which, they argue mistakenly, on its face reaches only unilateral conduct, cannot incorporate a *broader* concept of concerted action than that defining the outer reaches of section 1. They then conclude by saying:

> "The only concerted actual monopolization cases cited by Dr. Morgenstern all involve concerted action that did satisfy, or if completed would satisfy, the Section 1 requirement of agreement. (Footnote citation omitted). At most,

> therefore, Dr. Morgenstern's concerted actual monopolization theory extends only to cases where the plaintiff proves that the defendants formed an 'agreement' within the meaning of Section 1."

Defendants' Reply Memorandum in Support of Motion for Judgment as a Matter of Law, p. 32. But relying upon the cases cited by Dr. Morgenstern does not carry the day for the defendants' argument. No case cited by either side, as far as I can tell, says that a section 2 monopolization by concerted action must have proof of an agreement to perform the alleged predatory acts.

What section 2 does require, I think, for monopolization by concerted action is intent to monopolize. Whether that makes the use of the word "agreement" appropriate may depend upon the case, but it is not mandatory that the concept of "agreement" be used.

> "And even if we assume that a specific intent to accomplish . . . [expansion of a monopolist's empire by using his monopoly power], he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did."

United States v. Griffith, 334 U.S. 100, 108 (1948). In the present case I required the plaintiff to prove, as an essential element of his claim, that "the defendants willfully maintained [monopoly] power through restrictive or exclusionary conduct." Instruction titled "PLAINTIFF'S CLAIM – ESSENTIAL ELEMENTS." As a part of the definition of "willful maintenance," I instructed:

> "To prove that the defendants acted willfully, the plaintiff must prove either that the defendants engaged in restrictive or exclusionary acts or practices with a conscious object of furthering the dominance of the defendants in the relevant market or that this was the necessary and direct consequence of the defendants' conduct or business arrangements."

The defendants charge that in this case there really could be no union or combination or, in their words, "an agreement," because "from the cardiologists' point of view, [it] would make no economic sense: because the cardiologists receive absolutely no money from the practice of surgery by CVTS, their sole incentive is to make the best possible referral recommendation for their patients." Defendants' Reply Memorandum in Support of Motion for Judgment as a Matter of Law, pp. 37-38. I think the jury could find that it made economic sense for the cardiologists to join the cardiac surgeons.

It is obvious that assured and regular referrals from the cardiologists to the cardiac surgeons were of economic benefit to the cardiac surgeons; a joinder would free the cardiac surgeons from relying upon the vagaries of nondefendant cardiologists who might attempt to or actually move into the market or upon a hoped-for disposition on the part of the defendant cardiologists to favor only the defendant cardiac surgeons with referrals. It was to be expected that a uniting of the defendant cardiologists and the defendant cardiac surgeons by forming NHI would create a natural magnetic force of drawing referrals from the member cardiologists to the member cardiac surgeons.

From the cardiologists' point of view a secure and prosperous collection of cardiac surgeons (whose security and prosperity would be due in part to the union with the cardiologists) with whom the cardiologists would be allied in the public's mind would tend to provide at least economic security and probable increase in income. Joint marketing as NHI and repetitive referrals within the membership of NHI would tend to create in the public's mind that perception of alliance and even of unity. Economic sense of the collective arrangement may have been clearer for the cardiac surgeons, but it was not lacking for the cardiologists.

III.

The jury exonerated Cardiology Consultants, P.C. (CCPC) and Cardiovascular & Thoracic Surgery, P.C. (CVTS), the two professional corporations of cardiologists and cardiac surgeons, respectively. The defendants argue that that exoneration forecloses individual liability on the cardiologists and cardiac surgeons.

The heart of the defendants' argument is that the defendant cardiologists practice medicine only through CCPC and the defendant surgeons practice medicine only through CVTS; therefore, the only parties capable of combining to commit predatory acts are CCPC and CVTS, both of which the jury exonerated, which necessarily exonerates the individual defendants.

This argument is appealing on its face, but the problem is that the evidence indicates that the two anticompetitive acts found by the jury were not done by CCPC or

CVTS, but by the individual defendants. The stockholders of NHI are the individual defendants; CCPC and CVTS did not form NHI and do not and legally cannot own any interest in NHI. *Neb. Rev. Stat.* § 21-2202(3) (Reissue 1991). The *forming* of NHI by the individual defendants was not, the jury could find, an act of CVTS or CCPC; when the individual defendants set up NHI, they were not acting in their group role but in their individual role.

Similarly, the making of referrals, the jury could find in light of the defendants' own testimony, was not an act of the group – CCPC – but of the individual cardiologists. For example, Dr. Wilson was very clear about his understanding:

> "Q. What do you mean it's not a group decision?
>
> A. Well, the referral pattern is not, in my mind, and not in fact, a decision that the group should make or can make. If the group decided that we – by "decided," if there was some motion made and it passed that we were going to send, yes, we were going to commit ourselves to send one-fifth of the patients to Dr. Morgenstern, I would have said no way, the group will not tell me to whom I will refer patients. And not just to Dr. Morgenstern, if there was a motion that we're going to send all of our nephrology patients to Dr. Wes Spry I'd say no way, that's my decision, this is an individual decision. And I would have not only vigorously opposed any such motion, which was never made, but if there was any such motion made I would have vigorously opposed it. And if it had been passed I would have refused to comply with it. I'd say hey, this

> is not you, the group, this is not the group's decision"

Transcript 3367:14-3368:9.[1]

Exoneration of CVTS and CCPC, as principals, does not relieve the agents of those professional corporations for acts not within the scope of the practice of those corporations.[2] As individuals, the individual defendants collectively formed NHI and they individually made referrals. The result was, expectedly and naturally, the jury could find, a single economic unit consisting of the individual defendants and NHI, which single economic unit exercised through the individual defendants an anti-competitive act of making referrals from the cardiologists to the cardiac surgeons who were within that economic entity and to no one else. Thus, though acting singly in making referrals, the individual defendants were acting in their role as representatives of the single economic unit consisting collectively of them and NHI.

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[1] The defendants' reply brief quotes part of this and cites the transcript at pages 3224, 3237, and 3296-7. Obviously, the pagination of the present copies of the transcript varies.

[2] *See* 1, *Restatement (Second) of Agency* § 235 (1958); *Wolfson Car Leasing Co. v. Weberg*, 200 Neb. 420, 427, 264 N.W.2d 178, 182 (1978); *Ambrosio v. Price*, 495 F. Supp. 381, 385 (D. Neb. 1979).

IV.

The remaining arguments made by the defendants are that no reasonable jury could find that Dr. Morgenstern properly established the necessary relevant market or that Dr. Morgenstern established that the individual defendants jointly possessed monopoly power, that no reasonable jury could find that the formation of NHI was predatory and that no reasonable jury could find that the cardiologists' failure to make referral recommendations to Dr. Morgenstern was predatory.

I shall not deal with these arguments more extensively than to say that the defendants in essence are making arguments as if to a jury. There was evidence quite sufficient for the jury to make the findings of liability required by the instructions.

IT IS ORDERED, that the defendants' Rule 50 motion for judgment, filing 306, is denied.

Dated April 26, 1993.

BY THE COURT

/s/ Warren K. Urbom
United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DAN MORGENSTERN, Plaintiff, vs. CHARLES S. WILSON, et al., Defendants.	)	CV90-L-34 MEMORANDUM AND ORDER ON DEFENDANTS' MOTION FOR A NEW TRIAL (Filed Apr. 26, 1993)

The most recent explanation of the appropriate standard in this circuit for examining a motion for a new trial for insufficient evidence appears in *White v. Pence*, 961 F.2d 776 (8th Cir. 1992). After reviewing the several cases that had been interpreted by the district court to be in conflict, the court of appeals quoted *Cities Service Oil Co. v. Launey*, 403 F.2d 537, 540 (5th Cir. 1968), saying:

> "Regardless of the rhetoric used the true standard for granting a new trial on the basis of the weight of the evidence is simply one which measures the result in terms of whether a miscarriage of justice has occurred. When through judicial balancing the trial court determines that the first trial has resulted in a miscarriage of justice, the court may order a new trial, otherwise not. . . .
>
> . . . .
>
> The district court's discretion is not boundless, however. We stated in *Fireman's Fund* . . . that the district court is not 'free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn

> different inferences or conclusions or because judges feel that other results are more reasonable.' *Fireman's Fund*, 466 F.2d at 186 (quoting *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 . . . (1944). . . .
>
> . . . .
>
> Our cases make clear that in ruling on a motion for new trial, the district court must state its reasons for concluding that the verdict is against the great weight of the evidence. . . . "

White, 961 F2d at 780-81.

I

The first and most significant argument made by the defendants is that there was insufficient evidence to support any jury finding of any damage amount. I think the defendants' position on that is well taken to the extent that the evidence of any amount of damages was so insubstantial that the jury necessarily relied upon a good deal of speculation and, as a result, a verdict in the amount of $1,467,000 was a miscarriage of justice.

I am aware of the language of *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946):

> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created . . . That principle is an ancient one . . . and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application."

There still needs to be sufficient evidence from which a jury can receive reasonable guidance in determining some amount of damages from the monopolization. Here, I find that there was evidence of damage, but that the amount thereof was so without guidance, except in the broadest framework, that the verdict cannot stand.

The plaintiff's technique was one of three identified in *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., Ltd.*, 467 F.Supp. 841 (N.D.Cal. 1979) – "[c]omparison of plaintiff's performance before and after the wrongful conduct under otherwise similar conditions." *Id.* at 863.

The plaintiff's evidence shows the following:

1. the plaintiff, during the two years he was associated with Nebraska Heart Institute (NHI), performed 17.6 percent of the cardiac surgeries performed by NHI-associated surgeons (Exhibit 104);

2. NHI-associated surgeons have performed 2,509 cardiac surgeries since the plaintiff opened his sole practice on July 10, 1989; (Transcript p. 303).

3. if the plaintiff had performed all the cardiac surgeries performed by NHI surgeons between the plaintiff's opening his own office and the trial, he would have billed an amount of $7,280,392, assuming they had been billed at 100 percent of the Medicare rate or $13,249,744, if billed at the 100 percent full-fee rate of Dr. Morgenstern. (Exhibits 169-172; Transcript p. 328-29).

4. in Dr. Morgenstern's experience about 50 percent of cardiac surgery patients are Medicare patients; (Transcript p. 315-16).

5. some patients have no money and no insurance; (Transcript p. 338). (No estimate of how many patients or what percentage is shown).

6. two, three or four percent of the patients Dr. Morgenstern operated on were Medicaid patients; (Transcript p. 340).

7. Medicaid pays 20 to 25 percent less than Medicare; (Transcript p. 340).

8. Medicare pays 80 percent of the allowable rate for the surgery, but some patients have Medigap insurance; (Transcript p. 340).

9. In about 25 percent of the cases the insurance company pays the full fee; (Transcript p. 342).

10. Exhibit 173, a summary of Exhibits 169-172, does not include any extra charges for complications or additional procedures. (Transcript p. 350).

11. after leaving his association with NHI, the plaintiff performed six cardiac surgeries, (Transcript p. 168), the last of which was performed in May 1990, (Transcript p. 171), and none of the cardiac surgeries was as a result of a referral from an NHI cardiac surgeon;

12. a cardiac surgeon should have about 100 cases a year as lead surgeon in order to keep his skills sharpened; (Transcript 229).

13. in developing his own individual practice after leaving NHI the plaintiff expected a drop in referrals, but not to zero; (Transcript p. 370), but he did not have a specific number in mind; (Transcript p. 1195).

14. he expected his referrals to grow over time; (Transcript p. 370).

15. his pay while employed by CVTS was $75,000 for the first year, (Transcript p. 468), and $100,000 for the second year; (Transcript p. 469).

16. his income from the practice of medicine in 1989, after leaving CVTS, for six months was $34,000, for 1990 was about $250,000 and for 1991 was about $261,000. (Transcript 1223-4).

The ultimate question is what the plaintiff lost as a result of the monopolistic practices of the individual defendants and NHI; that is, what cardiac surgery business would have come to him if the individual defendants had not created NHI and if the individual defendants and NHI had not referred cardiac surgeries solely to NHI cardiac surgeons? The evidence simply leaves the factfinder largely at sea on that issue. By the plaintiff's reckoning, the amount should have been in terms of money, something more than zero and not more than $2,000,331.95.

The evidence is to the effect that the establishing of a sole practice takes time – how much time is not touched upon by any evidence, except by Dr. Robert Lynch, a private practitioner of cardiovascular surgery in Omaha, Nebraska, who expressed the opinion that a sole cardiac surgeon would take a minimum of five years to develop a practice. (Transcript p. 4183). Dr. Morgenstern was in practice with the NHI-related surgeons for two years. Those two years, of course, saw the plaintiff carried on the reputation of the NHI-affiliated surgeons. Nothing in

the evidence is persuasive that any measurable amount of that reputation would carry over to the plaintiff when he opened his own practice. Furthermore, he did little to promote his own solo practice. Though during the summer of 1990, when he first opened his own office, he wrote letters to every physician on the Nebraska Medical Association Roster with the exception of physicians in Omaha (Transcript p. 151), ran an announcement in the local Lincoln newspaper for ten days (*Id.* 151), visited 25 or 30 physicians in Lincoln (*Id.* 152), sent a letter to chiefs of staff of various hospitals in other parts of the state and to chiefs of various county medical societies, (*Id.* 152-53), and sent another letter to Lincoln primary care physicians (*Id.* 153-54), he talked with nobody in state government about the need of state institutions for medical service, talked with no private industry about whether it wanted his services (*Id.* 1128-9), made no further contact with cardiologists to ask them to send him patients, because it was not his style (*Id.* 1251-2), and filed this lawsuit against all the cardiac surgeons and cardiologists in Lincoln on February 1, 1990, seven months after opening his solo practice.

There was no expert who testified to what might reasonably be expected in a solo practice or any other kind of practice in a fully competitive environment. There was no evidence of success or failure of other cardiac surgeons in establishing a practice in a fully competitive environment.

The plaintiff complains in his responsive brief that his evidence was limited by resistance of the defendants to discovery attempts by the plaintiff and by restrictive

rulings by the court to his discovery attempts. The plaintiff's case, however, must rest upon the evidence that was put before the jury and that evidence was insufficient to enable the jury reasonably to calculate the amount of damage done to the plaintiff by the monopolistic practices of the defendants. I do not know what other evidence was available, but the evidence being sought by discovery would not have assisted in filling the gaps that make the plaintiff's case insufficient.

I have considered the possibility of a remittitur in order to enhance the possibilities of resolving this case without another trial, but my efforts have simply lead [sic] me to the conclusion that an attempt by me to estimate the actual damage resulting to the plaintiff under the evidence now before me would be as speculative as the jury's I see no solution but to have a new trial on the issue of damages only.

II

Other complaints by the defendants center upon the plaintiff's "acting in concert" theory, but I have written about the propriety of that theory in the memorandum and order on motion for judgment as a matter of law, and I shall not repeat the analysis made there.

III

The defendants charge that the instruction given to the jury on wilful maintenance was improper. The defendants quote only a portion of that instruction and claim that it is not tightly enough drawn. The instruction

tracks, for the most part, instruction 9 of the Sample Jury Instructions in Civil Antitrust Cases by the Section of Antitrust Law of the American Bar Association, 1987. It is true that the Eighth Circuit Court of Appeals sometimes uses the terms "predatory" or "anticompetitive," but, as far as I can tell, the definitions used for those terms are substantively the same as the definitions contained in the wilful maintenance instruction I gave.

The defendants argue:

> "Instead of describing 'restrictive' or 'exclusionary' conduct exclusively as the Eighth Circuit has defined predatory conduct – conduct that eliminates competition 'without legitimate business purpose' . . . – the instructions describe as 'restrictive' or 'exclusionary' conduct that 'impair[s] the efforts of others to compete for customers' or 'make[s] it difficult or impossible for competitors to engage in fair competition."

(Defendants' Memorandum in Support of Motion for New Trial, p. 31). The defendants have overlooked much of the instruction I gave. It says, in part:

> "Restrictive or exclusionary conduct is conduct that has the effect of preventing or excluding competition or frustrating or impairing the efforts of others to compete for customers within the relevant market. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in maintaining the defendants' monopoly power.
>
> Restrictive or exclusionary conduct is conduct without legitimate business purpose. Such conduct makes sense only because it eliminates competition. To be restrictive or exclusionary

> the conduct must be capable of materially impacting an equally efficient competitor's market viability. Acts which are typical of those used in a competitive market are not restrictive or exclusionary."

IV

The defendants next claim that the special interrogatories submitted to the jury permitted liability based solely upon a finding of predatory intent. The specific complaint is that question 5 "asked whether the defendants had willfully maintained monopoly power 'by restrictive or exclusionary means *or for restrictive or exclusionary purposes*' . . . Through its disjunctive contrast of 'means' and 'purposes,' question 5 clearly indicated that conduct may be held predatory (assuming *arguendo* that 'restrictive or exclusionary' is an adequate synonym for 'predatory') based *solely* upon a finding of predatory intent." (Defendants' Memorandum in Support of Motion for New Trial, p. 32-33). This is an objection that was not raised to the instructions in the instruction conference and I shall not give it further consideration. *See* Transcript pp. 5761-5763.

V

Next, the defendants claim that the instructions permitted a recovery for damages without showing an antitrust injury. They point to the word "any" in the second paragraph of the instruction titled "INJURY AND DAMAGES." From that they argue that the instructions do not require that the injury be from an antitrust violation. The

argument is specious. The instruction in the third paragraph says that in order for the plaintiff to recover damages "he must prove that he was injured as a result of the defendants' alleged violation of the antitrust laws." Three sentences later it says that the plaintiff must prove "that he was in fact injured by the defendants' alleged antitrust violation." In the following paragraph the instruction says that the plaintiff must have proved "that some damage flowed to him as a result of the defendants' alleged antitrust violation." Shortly thereafter the instruction says "It is enough if plaintiff has proved that the alleged antitrust violation was a material cause of his injury. However, if you find that the plaintiff's injury was caused by something other than the alleged antitrust violation, then you must find that the plaintiff has failed to prove that he is entitled to recover damages from the defendants."

VI

Next, the defendants argue that the plaintiff's expert, Dr. Bronsteen, was permitted to express opinions based on speculation, because he assumed a relevant product market for which there is no support in the record, because his analysis of the relative geographic market was fatally defective and because his monopoly power conclusion rested on incorrect assumptions and inadequate analysis. I am not persuaded. The defendants' position essentially is that the expert was not really persuasive, but that is an argument that was made to the jury and evidently rejected by the jury. I find no basis for putting aside Dr. Bronsteen's analysis.

VII

Numerous other claimed errors in the instructions and in evidentiary rulings are claimed, but I have reviewed them and stand by the decisions I made at the trial.

IT IS ORDERED that the defendants' motion for a new trial, filing 305, and defendants' supplemental motion for a new trial, filing 313, are granted to the extent that there shall be a new trial on the issue of the amount of damages only; the motions are otherwise denied.

Dated April 26, 1993.

BY THE COURT

/s/ Warren K. Urbom
United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DAN MORGENSTERN, Plaintiff, vs. CHARLES S. WILSON, et al., Defendants.	CV90-L-34 ORDER FOR INJUNCTIVE RELIEF (Filed April 26, 1993)

In accordance with the verdict of the jury, 15 U.S.C. § 15 and the equitable powers of the court under 15 U.S.C. § 26,

IT IS ORDERED that:

1. defendants Charles S. Wilson, M.D., Deepak M. Gangahar, M.D., Herbert E. Reese, M.D., Walter F. Weaver, M.D., Christopher C. Caudill, M.D., Joseph R. Gard, M.D., Sabyashachi Mahapatra, M.D., Robert J. Buchman, M.D., Michael A. Breiner, M.D., Alan D. Forker, M.D., Stephen W. Carveth, M.D., Cardiovascular & Thoracic Surgery, P.C., Cardiology Consultants, P.C., and Nebraska Heart Institute, P.C., their officers, agents, servants, employees, and attorneys and all persons in active concert or participation with them who receive actual notice of this judgment by personal service or otherwise are permanently enjoined, as follows:

   within sixty (60) days after this order becomes final following completion of the appellate process (1) Nebraska Heart Institute, P.C. shall be dissolved,

or (2) ownership of the stock in Nebraska Heart Institute shall be either (a) by cardiac surgeons only, in which event control and making of business and professional decisions of Nebraska Heart Institute, P.C. shall not be in whole or in part by Cardiology Consultants, P.C. or by any cardiologist, and Nebraska Heart Institute, P.C. shall not market the services of any cardiologist or cardiologists or organization of cardiologists, or (b) by cardiologists only, in which event control and making of business and professional decisions of Nebraska Heart Institute, P.C. shall not be in whole or in part by Cardiovascular & Thoracic Surgery, P.C. or by any cardiac surgeon, and Nebraska Heart Institute, P.C. shall not market the services of any cardiac surgeon or cardiac surgeons or organization of cardiac surgeons;

2. the injunctive relief set out in paragraph 1 is done for the reason that the jury under proper instructions found on the monopolization claim for the plaintiff and against the defendants named in paragraph 1, particularly finding that there is a relevant product market, as alleged by the plaintiff, consisting of adult cardiac surgery, covering the counties in Nebraska of Lancaster, Adams, Hall, Gage, Buffalo, Dawson, Seward, Lincoln, York, Saline, Custer, Fillmore, Saunders, Phelps, Otoe, Richardson, Thayer, Clay, Jefferson, Platte, Hamilton, Johnson, Nuckolls, Furnas, Cass and Pawnee; that the defendants have monopoly power, have

conducted restrictive or exclusionary acts in forming Nebraska Heart Institute and in failing to refer patients to the plaintiff or referring patients only to other defendants; have wilfully maintained monopoly power by restrictive or exclusionary means or for restrictive or exclusionary purposes, rather than as a consequence of offering a superior medical service or by exercising superior business judgment; and that such conduct caused injury to the plaintiff in his business or property.

Dated April 26, 1993.

BY THE COURT

/s/ Warren K. Urbom
United States Senior
District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2446NEL

Dan A. Morgenstern, M.D.	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
Appellee,	*	
v.	*	
Charles S. Wilson, M.D., et al,	*	
Appellants.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Beam took no part in the consideration or decision of this case.

September 9, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DAN A. MORGENSTERN, M.D., Plaintiff, vs. CHARLES S. WILSON, M.D., DEEPAK M. GANGAHAR, M.D., HERBERT E. REESE, M.D., WALTER F. WEAVER, M.D., CHRISTOPHER C. CAUDILL, M.D., JOSEPH R. GARD, M.D., SABYASACHI MAHAPATRA, M.D., ROBERT J. BUCHMAN, M.D., MICHAEL A. BREINER, M.D., ALAN D. FORKER, M.D., STEPHEN W. CARVETH, M.D., CARDIOVASCULAR & THORACIC SURGERY, P.C., CARDIOLOGY CONSULTANTS, P.C., AND NEBRASKA HEART INSTITUTE, P.C., Defendants.	CV90-L-34 JUDGMENT (Filed Sept. 29, 1994)

In accordance with the mandate of the Eighth Circuit Court of Appeals,

IT IS ORDERED that judgment is entered for the defendants.

Dated September 29, 1994.

BY THE COURT

/s/ Warren K. Urbom
United States Senior
District Judge

App. 40

FINAL JURY INSTRUCTIONS

I remind you that the instructions given at the outset of the trial, of which you have copies, and the instructions I gave during the trial remain in effect. I now give you these additional instructions.

* * *

RELEVANT MARKET – GENERAL

In order for monopoly power to exist, it must exist within an economically meaningful market, or what is called a relevant market.

Defining the relevant market is essential because you are required to make a judgment about whether the defendants have power over prices, quality or competition. To do so, you must be able to determine what economic forces, if any, restrain their freedom to act as they please. The most likely and most important restraining force will be competition from other physicians. This includes all physicians in hospital-based heart programs who act as a real and practical restraint on the defendants' power to set prices or affect quality or eliminate competition as they please. All the physicians who exert this restraining force are considered to be within what is called the relevant market.

There are two aspects you must consider in defining a relevant market. The first is the relevant product market; the second is the relevant geographic market.

* * *

RELEVANT GEOGRAPHIC MARKET

The other aspect of relevant market to be considered is the geographic area within which the products or services compete. This area of effective competition need not be of any particular size. For example, it can be as large as the United States or as small as a single community.

The relevant geographic market is the area in which the defendants face competition from physicians who supply competing services that are in the relevant product market, and to which a patient can practicably turn for service.

To determine the proper geographic market, you may consider whether changes in prices or quality at one location have fairly direct or substantial effects on prices or quality at other locations, and whether the people in the health-care industry and the public at large view physicians in the different locations as being in competition with each other. Such evidence would tend to prove that the different locations are in the same relevant geographic market.

You may also consider how readily patients and referring physicians can and do shift from seeking cardiac services in one location to seeking them in another. Evidence that patients and referring physicians shift readily among different locations in response to price or quality changes would tend to indicate that the different locations are in the same geographic market.

In addition, you may consider where patients and referring physicians, as a practical matter, can and do seek cardiac services; that is, whether patients residing in

one area buy from the same sources as patients residing in another area or if they buy from local sources rather than more distant sources because they find it more convenient or practical to do so. In this regard, you may consider whether dissatisfaction with prices or quality of cardiac service by physicians in Lincoln would cause a substantial number of patients or referring physicians to turn to more remote sources of supply, such as Omaha or elsewhere. If so, the two locations are part of the same geographic market.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DAN A. MORGENSTERN, Plaintiff, vs. CHARLES S. WILSON, et al., Defendants.	)	CV90-L-34 INTERROGATORIES (Filed Sept. 29, 1992)

We, the jury, unanimously make the following findings in respect to the plaintiff's claim in this case:

RELEVANT MARKET

1. Is there a relevant product market, as alleged by the plaintiff, consisting of adult cardiac surgery?

Yes X No ___

Answer Questions 2 and 3 *only* if you have answered "yes" to Question 1.

2. What do you determine to be the relevant geographic market for the provision of adult cardiac surgery services?

The following Nebraska counties: Lancaster, Adam, Hall, Gage, Buffalo, Dawson, Seward, Lincoln, York, Saline, Custer, Fillmore, Saunders, Phelps, Otoe, Richardson, Thayer, Clay, Jefferson, Platte, Hamilton, Johnson, Nuckolls, Furnas, Cass, Pawnee

MONOPOLIZATION

3. Do the defendants have monopoly power, that is, the power to control prices, lower quality, or exclude competition in the relevant market?

Yes X No ___

Answer Question 4 *only* if you have answered "yes" to Question 3.

4. Do you find that any of the following alleged conduct of the defendants have been restrictive or exclusionary:

(a) Forming Cardiology Consultants, P.C.?

Yes ___ No X

(b) Forming Nebraska Heart Institute?

Yes X No ___

(c) Failing to refer patients to the plaintiff, or referring patients only to other defendants?

Yes X No ___

(d) Refusing to assist the plaintiff in cardiac surgery?

Yes ___ No X

Answer Question 5 *only* if you have answered "yes" to any part of Question 4.

5. Have the defendants wilfully maintained monopoly power by restrictive or exclusionary means or for restrictive or exclusionary purposes, rather than as a

consequence of offering a superior medical service or by exercising superior business judgment?

Yes X No ___

INJURY

Answer Question 6 *only* if you have answered "yes" to Question 5.

6. Did the defendants' conduct as found by you herein cause an injury to plaintiff in his business or property?

Yes X No ___

DAMAGES

Answer Question 7 only if you have answered "yes" to Question 6.

7. What do you determine to be a fair dollar calculation of the damages incurred by plaintiff because of the defendants' conduct.

$1,467,000

Dated September 29, 1992.

/s/ Daniel H. Hollatz
Foreperson

Supreme Court, U.S.
FILED
JAN 6 1995
OFFICE OF THE CLERK

No. 94-1047

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DAN A. MORGENSTERN, M.D.,

Petitioner,

v.

CHARLES S. WILSON, M.D., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether orders that explicitly grant injunctions must satisfy the additional requirements for appealability under 28 U.S.C. § 1292(a)(1) set forth in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981).

2. Whether the order in this case "grant[ed]" an injunction within the meaning of Section 1292(a)(1).

3. Whether the Seventh Amendment prevents federal courts from setting aside factually unsupported jury verdicts.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were petitioner Dan A. Morgenstern, M.D. and respondents Michael A. Breiner, M.D., Robert J. Buchman, M.D., Stephen W. Carveth, M.D., Christopher C. Caudill, M.D., Alan D. Forker, M.D., Deepak M. Gangahar, M.D., Joseph R. Gard, M.D., Sabyasachi Mahapatra, M.D., Nebraska Heart Institute, P.C. ("NHI"), Herbert E. Reese, M.D., Walt F. Weaver, M.D., and Charles S. Wilson, M.D. The parties to the proceedings in the United States District Court for the District of Nebraska also included Cardiology Consultants, P.C. ("CCPC") and Cardiovascular & Thoracic Surgery, P.C. ("CVTS"), neither of which was a party to the Eighth Circuit proceedings.

Respondent NHI, which is wholly owned by thirteen individual physicians, has no parent companies or subsidiaries. CCPC and CVTS are also wholly owned by individual physicians, and neither corporation holds any subsidiaries. All other parties to the proceedings are individual physicians.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS FOR DENYING THE WRIT 4

A. *CARSON* DOES NOT APPLY TO ORDERS THAT EXPLICITLY GRANT OR DENY INJUNCTIONS 5

B. THE ORDER IN THIS CASE EXPLICITLY GRANTED AN INJUNCTION 10

C. THE SEVENTH AMENDMENT DOES NOT PREVENT FEDERAL COURTS FROM SETTING ASIDE FACTUALLY UNSUPPORTED JURY VERDICTS 13

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A., 875 F.2d 1174 (5th Cir. 1989), *cert. denied*, 493 U.S. 1075 (1990) 7
Brown v. Kerr-McGee Chemical Corp., 767 F.2d 1234 (7th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986) . . 6, 7
Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988) 9
Cable Holdings of Battlefield, Inc. v. Cooke, 764 F.2d 1466 (11th Cir. 1985) 6
Carson v. American Brands, Inc., 450 U.S. 79 (1981) 2, 5, 7, 9
Casey v. Planned Parenthood, 14 F.3d 848 (3d Cir. 1994) 7
Chronicle Publishing Co. v. Hantzis, 902 F.2d 1028 (1st Cir. 1990) 8
Cohen v. Board of Trustees of Univ. of Medicine, 867 F.2d 1455 (3d Cir. 1989) (in banc) 6, 7, 12
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 9
EEOC v. Kerrville Bus Co., 925 F.2d 129 (5th Cir. 1991) 7
E.P. Hinkel & Co. v. Manhattan Co., 506 F.2d 201 (D.C. Cir. 1974) 3
Frutiger v. Hamilton Central School Dist., 928 F.2d 68 (2d Cir. 1991) 8
Galloway v. United States, 319 U.S. 372 (1943) 13
Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978) 9
Gould v. Control Laser Corp., 650 F.2d 617 (5th Cir. 1981) 6

TABLE OF AUTHORITIES (Cont'd.)

Page

Graff v. City of Chicago, 986 F.2d 1055 (7th Cir.), *vacated on other grounds*, No. 92-2352 (April 15, 1993), *jurisdictional holding reinstated*, 9 F.3d 1309 (7th Cir. 1993) (en banc), *cert. denied*, 114 S. Ct. 1837 (1994) 7
Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) 9
Hedberg v. State Farm Mut. Auto. Ins. Co., 350 F.2d 924 (8th Cir. 1965) 4
Hinton v. Department of Justice, 844 F.2d 126 (3d Cir. 1988) 8
Holmes v. Fisher, 854 F.2d 229 (7th Cir. 1988) 6, 7, 10
International Ass'n of Machinists & Aerospace Workers v. Eastern Airlines, 849 F.2d 1481 (D.C. Cir. 1988) 5
Justin Indus. v. Choctaw Securities, 920 F.2d 262 (5th Cir. 1990) (per curiam) 7
Kausler v. Campey, 989 F.2d 296 (8th Cir. 1993) 3
Lewis v. Tobacco Workers Int'l Union, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979) . . . 12
Live and Let Live, Inc. v. Carlsberg Mobile Home Properties, Ltd.-'73, 592 F.2d 846 (5th Cir. 1979) 11
Ross v. Zavarella, 916 F.2d 898 (3d Cir. 1990) 7
Sherri A.D. v. Kirby, 975 F.2d 193 (5th Cir. 1992) 6, 7
Smith v. Vulcan Iron Works, 165 U.S. 518 (1897) 3
South Bend Consumers Club, Inc. v. United Consumers Club, Inc., 742 F.2d 392 (7th Cir. 1984) 6
Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987) 9
Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23 (1966) 6, 9
Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc., 874 F.2d 1346 (10th Cir. 1989) 6
United States v. Bayshore Assocs., 934 F.2d 1391 (6th Cir. 1991) 6
United States v. RMI Co., 661 F.2d 279 (3d Cir. 1981) . . . 6

TABLE OF AUTHORITIES (Cont'd.)

Page

Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) 10
Williams Electronics, Inc. v. Artic Int'l, Inc.,
685 F.2d 870 (3d Cir. 1982) 8

STATUTES AND RULES

15 U.S.C. § 2 (1988 & Supp. II 1990) 2
15 U.S.C. § 26 (1988) 11
28 U.S.C. § 1291 (1988) 11
28 U.S.C. § 1292(a)(1) (1988) . . . . . *passim*
Fed. R. Civ. P. 62(a) 11

MISCELLANEOUS AUTHORITY

9 J. Moore & B. Ward, *Moore's Federal Practice*
(2d ed. 1994) 4, 6
16 C. Wright, A. Miller, E. Cooper & E. Gressman,
Federal Practice and Procedure (1977) 6
16 C. Wright, A. Miller, & E. Cooper, *Federal Practice*
and Procedure (Supp. 1994) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1047

DAN A. MORGENSTERN, M.D.,
Petitioner,

v.

CHARLES S. WILSON, M.D., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

Despite the complex and protracted antitrust litigation conducted below, this case now presents only two narrow questions regarding the interlocutory appealability of an injunction and one frivolous question regarding the constitutionality of setting aside a factually unsupported jury verdict.

Respondents are six cardiologists, five surgeons and the Nebraska Heart Institute, P.C. ("NHI"). At all times relevant to this case, the cardiologists and surgeons were engaged in separate group medical practices in Lincoln, Nebraska. These physicians created NHI to provide administrative, clinical and marketing services to their respective practices, Cardiology Consultants, P.C. ("CCPC") and Cardiovascular & Thoracic Surgery, P.C. ("CVTS"). Pet. App. 2-3.

In 1987, petitioner began employment as a surgeon with CVTS. After he failed to make partner there, petitioner opened a competing surgery practice in Lincoln, which attracted virtually no cardiac patients. Petitioner then filed a lawsuit against the eleven physicians, CCPC, CVTS and NHI, seeking injunctive relief and damages based on the physicians' allegedly unlawful acts of forming NHI and not recommending petitioner to patients in need of cardiac surgery. Pet. App. 3, 44.

A jury exonerated CCPC and CVTS of all liability, but concluded that respondents had monopolized a market for adult cardiac surgery, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. In finding that respondents possessed monopoly power within a relevant geographic market, the jury defined that market to include Lincoln and 26 surrounding counties "extending in certain directions over 200 miles beyond Lincoln" (Pet. App. 9), but to exclude Omaha, Nebraska, which is only "fifty-eight miles by main highway" from Lincoln (Pet. App. 11). The jury fixed damages, before trebling, at $1,467,000. Pet. App. 45. The District Court, however, granted respondents a new trial on damages. Pet. App. 25-30.

At the same time, the District Court entered an "Order For Injunctive Relief." Pet. App. 35. That order "permanently enjoined" respondents to dissolve or restructure the ownership of NHI "within sixty (60) days after this order becomes final following completion of the appellate process." Pet. App. 35-36. The order explained that its "injunctive relief" was "done for the reason that the jury under proper instructions found on the monopolization claim for the plaintiff." Pet. App. 36. Respondents sought interlocutory review of the injunction, and petitioner moved to dismiss the appeal as premature.

The Court of Appeals denied petitioner's motion to dismiss.[1] First, the court addressed the scope of this Court's decision in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), which

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[1] The court's opinion is reported at 29 F.3d 1291 (8th Cir. 1994).

held that orders with "the practical effect of refusing an injunction" are not interlocutorily appealable under 28 U.S.C. § 1292(a)(1) unless they also "have a 'serious, perhaps irreparable, consequence'" and "can be 'effectively challenged' only by immediate appeal." *Id.* at 84. The Court of Appeals explained that *Carson* creates "two separate avenues of analysis" under Section 1292(a)(1). Pet. App. 5. On the one hand, the court held, "if an interlocutory order expressly grants or denies a request for injunctive relief, the *Carson* requirements need not be met and the order is immediately appealable as of right under § 1292(a)(1)." Pet. App. 6. "By contrast, if an order merely has the practical effect of granting or denying an injunction, the *Carson* irreparable injury test must be satisfied." *Id.*

Next, the Court of Appeals held that the Order For Injunctive Relief explicitly "grant[ed]" an injunction within the meaning of Section 1292(a)(1). The court carefully considered "'the language of the order, the grounds on which it rests, [and] the circumstances in which it was entered.'" Pet. App. 6 (quoting *Kausler v. Campey*, 989 F.2d 296, 299 (8th Cir. 1993)). The court noted that the Order For Injunctive Relief, which by its terms "permanently enjoined" respondents to dissolve or restructure NHI (Pet. App. 35), "expressly granted the specific injunctive relief prayed for in Morgenstern's complaint." Pet. App. 6-7. Moreover, the court explained that the timing provision in the order, which created no doubt about the existence or scope of the "affirmative obligation" that the District Court had imposed on respondents, simply "stayed that obligation pending appellate review." Pet. App. 7.

On the merits, the Court of Appeals held that the injunction was infirm because there was insufficient evidence to support the underlying determination of monopolization liability.[2] The court

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[2] Petitioner does not dispute that a court of appeals properly reviewing an injunction also may review any finding of liability on which the injunction is based. *See, e.g., Smith v. Vulcan Iron Works*, 165 U.S. 518, 525 (1897); *E.P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201,

began with several undisputed propositions: first, a plaintiff must prove that the defendant possessed monopoly power within a well-defined geographic market; second, a geographic market encompasses areas "to which consumers can practicably turn for alternative sources of the product"; third, respondents' share of the relevant market would be only thirty percent if Omaha had been included in it; and fourth, a thirty percent share cannot, as a matter of law, support a finding of monopoly power. Pet. App. 8-10 & n.3.

The Court of Appeals then found insufficient evidence to support the definition of a geographic market that included Lincoln but not Omaha. The court explained that petitioner's evidence addressed the legally irrelevant question of where patients "*actually* went, as opposed to where they *could* practicably go, for their cardiac surgery services." Pet. App. 11 (emphases in original). Moreover, the court noted the implausibility of supposing that "fifty-eight miles by main highway" is a competitively significant distance for consumers of cardiac surgery services, especially when petitioner himself regularly traveled that distance to provide such services. Pet. App. 11-12. Finally, the court carefully reviewed the "overwhelming" affirmative evidence that Lincoln and Omaha occupy the same market, including the testimony of "health care providers in various professions throughout Nebraska" (who "uniformly confirmed the existence of vigorous competition between Lincoln and Omaha") and the testimony of respondents' expert (who provided "further corroborative evidence" in the form of economic studies specifically designed to measure practicable alternative suppliers). Pet. App. 12-13.

REASONS FOR DENYING THE WRIT

In pertinent part, 28 U.S.C. § 1292(a)(1) vests the courts of appeals with jurisdiction to review, before final judgment, district

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204 (D.C. Cir. 1974); *Hedberg v. State Farm Mut. Auto. Ins. Co.*, 350 F.2d 924, 933 (8th Cir. 1965) (Blackmun, J.); 9 J. Moore & B. Ward, *Moore's Federal Practice* ¶ 110.25[1], at 289-90 (2d ed. 1994).

court orders "granting, continuing, modifying, refusing or dissolving injunctions."[3] Petitioner provides no reason why this Court should reconsider the Court of Appeals' straightforward determination that the Order For Injunctive Relief was interlocutorily appealable under Section 1292(a)(1).

A. *CARSON* DOES NOT APPLY TO ORDERS THAT EXPLICITLY GRANT OR DENY INJUNCTIONS

In *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981), this Court held that orders with "the practical effect of refusing an injunction" are not interlocutorily appealable as injunctions unless they also inflict serious consequences and cannot be challenged effectively upon final judgment. Petitioner invites the Court to consider whether these requirements should be extended to orders, like the one at issue here, that grant or deny injunctions explicitly. Pet. 15-18. For several reasons, the Court should decline petitioner's invitation.

1. The lower courts are in widespread agreement that orders explicitly granting or denying injunctions fall squarely within the plain meaning of Section 1292(a)(1), and thus need not satisfy the additional *Carson* requirements for appealability. In holding that *Carson* does not apply "if an interlocutory order expressly grants or denies a request for injunctive relief" (Pet. App. 6), the Eighth Circuit followed at least seven other United States Courts of Appeals that have endorsed an identical rule. *See International Ass'n of Machinists & Aerospace Workers v. Eastern Airlines*,

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[3] Section 1292(a) provides that "the courts of appeals shall have jurisdiction of appeals from"

> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

849 F.2d 1481, 1486 n.11 (D.C. Cir. 1988); *Cohen v. Board of Trustees of Univ. of Medicine*, 867 F.2d 1455, 1466 (3d Cir. 1989) (in banc); *Sherri A.D. v. Kirby*, 975 F.2d 193, 203 & n.14 (5th Cir. 1992); *United States v. Bayshore Assocs.*, 934 F.2d 1391, 1395-96 (6th Cir. 1991); *Holmes v. Fisher*, 854 F.2d 229, 231-32 (7th Cir. 1988); *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 (10th Cir. 1989); *Cable Holdings of Battlefield, Inc. v. Cooke*, 764 F.2d 1466, 1471 (11th Cir. 1985).[4]

Ignoring all of this authority, and relying almost exclusively on dicta contained in a single decision, *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234 (7th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986), petitioner contends that the lower courts are divided. Pet. 13-15. But as petitioner quietly acknowledges (Pet. 14 n.8), *Brown* itself did not address any question about which orders must satisfy *Carson* requirements in order to be interlocutorily appealable. *See* 767 F.2d at 1239.

Moreover, the Third, Fifth and Seventh Circuit decisions that *Brown* described as having extended *Carson* to "all appeals under section 1292(a)(1)" (*id.* at 1238) in fact did no such thing. Each case merely applied *Carson* to orders granting defendants partial summary judgment on claims seeking equitable relief.[5] Under *Switzerland Cheese Association v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966), these summary judgment orders grant or deny

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[4] *See also* 9 J. Moore & B. Ward, *Moore's Federal Practice* ¶ 110.20[1], at 227 ("*Carson* has been read to leave unaffected cases that come within the text of the statute, that is those that actually grant or refuse an injunction."); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3924, at 67 (1977) ("Interlocutory orders that grant permanent injunctions also are easily reached [by Section 1292(a)(1)].").

[5] *See United States v. RMI Co.*, 661 F.2d 279, 279-82 (3d Cir. 1981); *Gould v. Control Laser Corp.*, 650 F.2d 617, 618-21 (5th Cir. 1981); *South Bend Consumers Club, Inc. v. United Consumers Club, Inc.*, 742 F.2d 392, 393-94 (7th Cir. 1984).

injunctions only in their "practical effect." *See Carson*, 450 U.S. at 84-85.

Finally, even if the "disagreement" incorrectly alleged in *Brown* (767 F.2d at 1238) would have justified review eight years ago (*but see* 475 U.S. 1066 (denying certiorari)), subsequent decisions have removed any possible confusion about the proper scope of *Carson*. In *Cohen*, for example, the Third Circuit, sitting in banc, unanimously held that *Carson* casts no doubt upon "[t]he appealability of grants of injunctive orders in whatever form." 867 F.2d at 1466.[6] In *Sherri*, the Fifth Circuit reaffirmed its numerous recent holdings that "[o]rders which explicitly grant or deny injunctive relief are immediately appealable as of right" and that "no additional finding of a threat of immediate, irreparable injury is required." 975 F.2d at 203.[7] And in *Holmes*, the Seventh Circuit held that *Carson* does not apply to orders that grant or deny injunctions "plainly." 854 F.2d at 231-32.[8]

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[6] The Third Circuit subsequently extended *Carson* to all orders *denying* injunctions, whether explicitly or in practical effect. *See Ross v. Zavarella*, 916 F.2d 898, 902 (3d Cir. 1990). Recently, however, that court has reaffirmed its position that *Carson* does not apply to orders explicitly *granting* injunctions. *See Casey v. Planned Parenthood*, 14 F.3d 848, 855 (3d Cir. 1994). This case, of course, involves only the latter kind of order.

[7] *See also EEOC v. Kerrville Bus Co.*, 925 F.2d 129, 131-32 (5th Cir. 1991); *Justin Indus. v. Choctaw Securities*, 920 F.2d 262, 265-66 n.2 (5th Cir. 1990) (per curiam); *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1176 (5th Cir. 1989), *cert. denied*, 493 U.S. 1075 (1990).

[8] *See also Graff v. City of Chicago*, 986 F.2d 1055, 1059-60 (7th Cir.) (holding *Carson* inapplicable "because this is not a practical effect case"), *vacated on other grounds*, No. 92-2352 (April 15, 1993), *jurisdictional holding reinstated*, 9 F.3d 1309, 1313 (7th Cir. 1993) (en banc), *cert. denied*, 114 S. Ct. 1837 (1994).

Petitioner also suggests that the question answered by these cases (whether *Carson* applies to orders that explicitly grant or deny injunctions) is distinct from the question discussed in *Brown* (whether *Carson* applies to orders that address the merits). Pet. 12-18. The Court of Appeals, however, held only that *Carson* does not apply to orders that grant or deny injunctions "expressly," rather than in "practical effect." Pet. App. 6. Thus, to the extent that *Brown* raises a distinct question whether *Carson* applies to orders that address the merits but do not grant or deny injunctions expressly, that question is simply not presented in this case.[9]

Moreover, the distinction urged by petitioner is fatal to any allegation of a *relevant* split of authority, since petitioner cites no case other than *Brown* that is even colorably inconsistent with the Court of Appeals' decision. In his entire discussion of what petitioner characterizes as the "practical effect" question as opposed to the "merits" question (Pet. App. 15-17), petitioner cites only *Williams Electronics, Inc. v. Artic International, Inc.*, 685 F.2d 870 (3d Cir. 1982). But the injunction granted in *Williams* was explicit, addressed the merits, and inflicted serious, perhaps irreparable consequences. *See id.* at 871. Thus, the jurisdictional question was entirely "'routine,'" and the court reviewed the injunction without discussion of any *Carson* issue. *Id.* (citation omitted).

2. Petitioner's proposed extension of *Carson* is also inconsistent with both the plain language of Section 1292(a)(1) and the decisions of this Court. By its terms, Section 1292(a)(1) provides interlocutory appellate jurisdiction over *all* orders

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[9] It is unclear whether these questions are as distinct as petitioner suggests. An order explicitly granting an injunction necessarily must address the merits, since an "injunction" by definition provides relief on the merits. *See, e.g., Frutiger v. Hamilton Central School Dist.*, 928 F.2d 68, 72 (2d Cir. 1991); *Chronicle Publishing Co. v. Hantzis*, 902 F.2d 1028, 1030 (1st Cir. 1990); *Hinton v. Department of Justice*, 844 F.2d 126, 130 (3d Cir. 1988).

"granting [or] refusing . . . injunctions." Frequently, this Court has considered the appropriateness of extending the statute to orders that do not themselves grant or refuse injunctions, but that have the same practical effect as orders that do. *See, e.g., Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 379 (1987) (order denying motion for intervention of right); *Carson*, 450 U.S. at 83-86 (order denying motion to enter consent decree); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480-82 (1978) (order denying motion for class certification); *Switzerland Cheese*, 385 U.S. at 24-25 (order denying motion for summary judgment). While the irreparable injury requirements provide necessary restrictions on the *extension* of Section 1292(a)(1) to such "practical effect" injunctions (*see, e.g., Carson*, 450 U.S. at 83-84), this Court has never asserted that orders actually "granting . . . injunctions" also must satisfy these same requirements.

In *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), the Court confirmed this straightforward understanding of *Carson*. *Gulfstream* stressed that Section 1292(a)(1) provides jurisdiction over *two* categories of orders: "orders that grant or deny injunctions *and* orders that have the practical effect of granting or denying injunctions and have '"serious, perhaps irreparable, consequence."'" *Id.* at 287-88 (quoting *Carson*, 450 U.S. at 84) (emphasis added). Petitioner's objections notwithstanding (Pet. 16 n.9), *Gulfstream* makes perfectly clear that "orders that grant or deny injunctions" are interlocutorily appealable regardless of whether they satisfy *Carson*'s irreparable injury requirements.

3. Finally, petitioner's proposed extension of *Carson* is profoundly unwise even as a policy matter. Petitioner reasons that because Section 1292(a)(1) provides interlocutory review over a class of orders that often can inflict irreparable injuries, the jurisdictional determination *in each case* must turn on irreparable injury. Pet. 17-18. But this Court often has warned of the debilitating effect of rules of appellate jurisdiction that are either unclear (*see, e.g., Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988)), factbound (*see, e.g., Coopers & Lybrand v.*

Livesay, 437 U.S. 463, 473-74 (1978)), or related to the merits of a dispute (*see, e.g., Van Cauwenberghe v. Biard*, 486 U.S. 517, 527-28 (1988)). Petitioner's irreparable injury requirement, if universally applied, would be all of the above.

Many have noted the folly of petitioner's proposed approach. Judge Easterbrook perhaps explained it best (in the context of orders denying injunctions):

> Section 1292(a)(1) is decently plain: all interlocutory orders denying injunctions are appealable. There may be difficult questions, as in *Carson*, whether a given decision *is* an interlocutory order denying an injunction, and it makes sense in characterizing an ambiguous order to determine whether it has the attributes that usually accompany the grant or denial of injunctions, attributes that led Congress to enact § 1292(a)(1). The process of characterization cannot be allowed to feed back into the propriety of an appeal from an order that is unquestionably an injunction. To do so would not only alter the operation of the statute but also allow the methods used to resolve borderline cases to dominate the center of the spectrum, driving out all vestiges of certainty. . . . [A]n appellate court should be able to accept or reject the appeal without squandering on jurisdictional matters time needed to decide the case on the merits. . . . Asking whether an order plainly denying an injunction *also* caused irreparable injury would add a gratuitously complicating factor to the simple statutory rule.

Holmes, 854 F.2d at 231-32 (emphases in original). *See also* 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3924, at 84 (Supp. 1994) ("[A]n open-ended interpretation of § 1292(a)(1) according to a sense of the policy of the final judgment rule and its exceptions invites chaos.").

B. THE ORDER IN THIS CASE EXPLICITLY GRANTED AN INJUNCTION

The Court of Appeals correctly concluded that the Order For Injunctive Relief "grant[ed]" an injunction within the meaning of

Section 1292(a)(1). The order invoked "the equitable powers of the court under 15 U.S.C. § 26." Pet. App. 35.[10] It began with the imperative "IT IS ORDERED that." *Id.* By its terms, it "permanently enjoined" respondents to dissolve or radically restructure NHI -- a central component of the relief sought by petitioner from the outset of this lawsuit. Pet. App. 35-36. The order was entirely self-executing, and it imposed on respondents obligations that were clear, fixed and absolute.

Petitioner, however, contends that the order could not have "grant[ed]" an injunction because respondents need not have complied with it until "sixty (60) days after . . . completion of the appellate process." Pet. App. 35. While not disputing the Court of Appeals' assertion that this timing provision simply imposed a stay pending appeal, petitioner argues that "an order which has been stayed" cannot support interlocutory appellate jurisdiction. Pet. 8 n.5.

Petitioner provides no support, however, for the startling proposition that a stay pending appeal destroys interlocutory appealability. The Federal Rules of Civil Procedure explicitly contemplate otherwise. *See* Fed. R. Civ. P. 62(a) ("Unless otherwise ordered by the court, an *interlocutory* or final judgment in an action for an injunction . . . shall not be stayed . . . during the pendency of an appeal." (emphasis added)). Petitioner relies on a single case holding that a stay of execution, pending consideration of post-trial motions, prevents a judgment from becoming "final" within the meaning of 28 U.S.C. § 1291. *See Live and Let Live, Inc. v. Carlsberg Mobile Home Properties, Ltd.-'73*, 592 F.2d 846, 848 (5th Cir. 1979). That case is hardly "analogous" (Pet. 8 n.5) to this one, however, for the whole point

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[10] Section 26 provides, in pertinent part, that "[a]ny person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws."

of Section 1292 is to make certain *non*-final orders *interlocutorily* appealable.

Petitioner also reads *Cohen* as holding that an order cannot "gran[t]" an injunction unless it is *immediately* enforceable by contempt. Pet. 10. In language stressed by petitioner, *Cohen* described immediately enforceable injunctions as but one example of "explicit" injunctions not subject to *Carson* requirements. *See* 867 F.2d at 1466. As another example, however, the court cited orders that "expressly" rule on motions for preliminary injunctions. *Id.* Regardless of questions about irreparable injury or immediate enforceability, the court held, "there is no difficulty in identifying [these orders] as falling within section 1292(a)(1)." *Id.* The same reasoning applies to orders that "expressly" rule on motions for *permanent* injunctions, because as *Cohen* itself explained (*id.* at 1464 n.7), Section 1292(a)(1) makes no distinction between preliminary and permanent injunctions.

Finally, petitioner seeks to extract a similar rule from *Lewis v. Tobacco Workers International Union*, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979). Pet. 10-11. *Lewis*, however, merely held that an injunction "requiring present affirmative action" was interlocutorily appealable. *See* 577 F.2d at 1139. Nothing in *Lewis* suggests that injunctions not requiring "present" action are *ipso facto* not appealable.

At bottom, petitioner's challenge does not rest on any rule of law adopted in *Live and Let Live*, *Cohen* or *Lewis*, but on the Court of Appeals' factbound application of the "granting" requirement of Section 1292(a)(1) to the injunction at issue in this case. In applying that requirement, the Court of Appeals carefully considered "'the language of the order, the grounds on which it rests, [and] the circumstances in which it was entered.'" Pet. App. 6 (citation omitted). Petitioner has failed to establish either that the court applied the "granting" requirement incorrectly or that, even if it did, this Court should review such a narrow and factbound determination.

C. THE SEVENTH AMENDMENT DOES NOT PREVENT FEDERAL COURTS FROM SETTING ASIDE FACTUALLY UNSUPPORTED JURY VERDICTS

Finally, petitioner argues that the Court of Appeals violated the Seventh Amendment by setting aside a factually unsupported jury verdict. Pet. 18-24. That contention is transparently without merit. *See, e.g., Galloway v. United States*, 319 U.S. 372, 389 (1943) ("If the intention is to claim generally that the [Seventh] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century.").

To the extent that petitioner also challenges the sufficiency determination made by the Court of Appeals in this case (Pet. 18-21), his claim plainly does not warrant this Court's review. And, as even a cursory review of the opinion below confirms, it too is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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